RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
ALI HAMZA AHMAD SULAYMAN AL BAHLUL

ALSO KNOWN AS:

ALI HAMZA AHMED SULEIMAN AL BAHLUL
ABU ANAS AL MAKKI
ABU ANAS YEMENI
MOHAMMAD ANAS ABDULLAH KHALIDI

NO. 040003

VOLUME ___ OF ___ TOTAL VOLUMES

3RD VOLUME OF REVIEW EXHIBITS (RE):
RES 141-172 (MAR. 1-2, 2006 SESSION)
(REDACTED VERSION)

United States v. Ali Hamza Sulayman al Bahlul, NO. 040003

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

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ALLIED PAPERS Not part of "record of trial"	
I*	Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications)
II*	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)
III*	DoD Decisions on Commissions including Appointing Authority

* Interim volume numbers. Final numbers to be added when trial is completed.

United States v. Ali Hamza Sulayman al Bahlul, NO. 040003

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[†] **Interim volume numbers. Final numbers to be added when trial is completed.**

UNITED STATES V. SALIM AHMED HAMDAN—REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

3RD VOLUME OF REVIEW EXHIBITS: REs 141-172 (200 PAGES)
SESSION OF MAR. 1-2, 2006

UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL, NO. 040003—3RD VOLUME OF REVIEW EXHIBITS

UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL, NO. 040003—3RD VOLUME OF REVIEW EXHIBITS

UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL, NO. 040003—3RD VOLUME OF REVIEW EXHIBITS

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Tuesday, January 17, 2006 3:52 PM
To: Harvey, Mark, Mr, DoD OGC
Cc: [redacted]
Subject: Request to Forward Materials to the Iowa State Bar Association and to the US Army Standards of Conduct Office

Mr. Harvey,

1. Please see Colonel Brownback's email below.

2. You are requested that when the materials have been sent, that you reply to this email and include the forwarding letter as an attachment. That email and attachment will be added to the filings inventory.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback [mailto[redacted]
Sent: Tuesday, January 17, 2006 3:39 PM
To: Hodges, Keith
Subject: Request to Forward Materials to the Iowa State Bar Association and to the US Army Standards of Conduct Office

Mr. Hodges,

Please forward the below email to Mr. Harvey and copy all interested parties in US v. Al Bahlul.

COL Brownback

Mr. [redacted] Harvey
Chief Clerk of Military Commissions

A request for opinion in a matter concerning the Military Commission case of United States v. Al Bahlul was sent to the Iowa State Bar Association on 3 January 2006 (RE 128) and to the US Army Standards of Conduct Office (SOCO) on 4 January 2006 (RE 130).

RE 141 (al Bahlul)
Page 1 of 2

As you are the custodian for all records of trial by military commission, I request that you forward the following Review Exhibits (RE) and other materials to the Iowa State Bar Association, so that their opinion, if any, when rendered can be based on a more complete account -- both factually and legally -- of the issue of representation in Al Bahlul.

a. The entire PO 102 series of documents
b. The current draft transcript of the 11 January 2006 session
c. The Circuit Court opinion in US v. Hamdan.

I also request that you advise the Iowa State Bar Association that the written ruling on Mr. Al Bahlul's pro se request will be issued around the end of January 2006 and that you will make it available to them immediately thereafter.

I would further request that if the Iowa State Bar Association wishes any other material that you provide it to them as soon as possible.

I request that you also forward the current draft transcript of the 11 January 2006 session to SOCO and advise them of the pending written ruling on Mr. Al Bahlul's request.

In making these requests to you, I realize that you will be forwarding documents which may or will have had sensitive information redacted and that you may insert, where necessary, disclosure (or non-disclosure) statements - either in the text of the document or in footers thereto.

Please insure that you provide a copy of all materials forwarded under this request to Mr. Hodges, the Assistant to the Presiding Officer.

Please note that there may be a future request for opinion in this case. However, the only parties to whom I wish matters forwarded at this time are Iowa and SOCO. If another request is made, I will be so advised promptly and I feel certain that the matters attached to any future request will contain all of the materials outlined above.

A copy of this email has been provided to the counsel in US v. al Bahlul.

Peter E. Brownback III
COL, JA
Presiding Officer

UNITED STATES OF AMERICA	)	**D – 101: Motion for an Order Preserving Potential Evidence**
V.	)	**PROSECUTION RESPONSE**
ALI HAMZA SULAYMAN AL BAHLUL	)	**18 January 2006**

1. This response is filed within the 7 calendar day requirement set out in paragraph 9 of Presiding Officer Memorandum (POM) 4-3.

2. The motion is legally insufficient. The Presiding Officer should deny the requested relief.

3. FACTS:

a) The Government does not concur with the Defense statement of facts. Much of the language in the Defense statement, such as "inadvertently," "noticeably absent," and "deliberate attempt," is speculative in nature, asserting characterizations and attributing motivations unsupported by fact.

b) On 9 January 2006, the Assistant to the Presiding Officers distributed copies of a compact disk (CD) containing the Review Exhibits (RE) received to date to the Prosecution and Defense. Each CD contained several electronic folders, named for the case to which the information in the folder pertained. The document attached to the defense motion was contained in the Khadr folder on that CD. No similar document appeared in the al Bahlul folder. The distribution of these CDs was consistent with POM 4-3, Motions Practice, POM 8-1, Trial Exhibits, and POM 12-1, Filing Inventory. The Prosecution did not receive hard copies of the al Bahlul RE filings from the Assistant to the Presiding Officers.

c) POM 2-2, dated 14 September 2005, specifies that the function of the Assistant to the Presiding Officers is "to provide advice in the performance of the Presiding Officer's adjudicative and administrative functions." Paragraph 1, POM 2-2. The Assistant to the Presiding Officers' duties include serving:

> as an attorney-assistant providing all necessary support to the Presiding Officers of Military Commissions in a broad array of legal issues, to include functional responsibility for legal and other advice on substantive legal, procedural, logistical, and administrative matters and services to the Presding Officers, Military Commissions.
>
> Paragraph 2a, POM 2-2.

d) Under Military Commission Instruction (MCI) 8, dated 16 September 2005, the duties of the Presiding Officer include "conducting appropriate *in camera* meetings to facilitate efficient trial proceedings." Paragraph 5, MCI 8. There is no indication on the record that the present Detailed Defense Counsel has objected to "such conferences."

d) On 10 January 2006, the Presiding Officer held an 8-5 conference with the Detailed Defense Counsel, the Lead Prosecutor, and two of the Assistant Prosecutors. *Inter alia*, the Presiding Officer and counsel for both parties discussed the sequence of matters anticipated during the session scheduled for the following day, 11 January 2006. The Presiding Officer repeatedly solicited comments or suggestions from counsel for both parties. Neither Prosecution nor Defense Counsel objected to the sequence of matters proposed by the Presiding Officer. The Presiding Officer informed counsel for both parties that the Assistant to the Presiding Officers would disseminate that afternoon a draft script for the Commission session, as well as a draft script that the Presiding Officer intended to use if the Accused reasserted his request to represent himself. The Detailed Defense Counsel stated that he had not yet met with the Accused and was unable to state with certainty whether the Accused would reassert his request to represent himself. The Presiding Officer offered counsel for both parties the opportunity to suggest changes to both draft scripts. Neither the Prosecution nor the Defense Counsel suggested or requested any change to the draft scripts.

e) During the Commission proceedings on 11 January 2006, the Detailed Defense Counsel made no objection to the sequence of the colloquy between the Presiding Officer and the Accused.

4. AUTHORITY:

a) The moving party bears the burden of proof and persuasion.

b) The sole legal authority cited by the Detailed Defense Counsel is not relevant to the request for relief.

5. ARGUMENT:

a) The document attached to the defense motion falls within the scope of the assigned duties of the Assistant to the Presiding Officers. Further, the document, a proposed administrative plan for an orderly hearing session in the Khadr case, does not pertain to Mr. al Bahlul. There is no evidence to support the Defense's assertions that the document served some illicit purpose.

b) The purported changes to the script reflect an adaptation of the standard script to the particular circumstances of the 11 January 2006 session of the United States v. al Bahlul. The Detailed Defense Counsel received prior notice of the adjustments to the script, and was present in the Commission proceedings that used that script as a guideline. The Detailed Defense Counsel did not object to the script before or during the Commission proceeding. As with the attached Kahdr document, there is no evidence to

support the Defense's assertions that the adjustments to the script served some illicit purpose.

c) The Detailed Defense Counsel cannot meet his burden of proof based upon pure speculation. Further, the Detailed Defense Counsel has cited no relevant legal authority in support of the present motion.

6. The Detailed Defense Counsel did not request oral argument. This motion may be decided based upon the evidence contained in the record. No witnesses are required.

WHEREFORE, the prosecution prays that the Presiding Officer deny the defense motion as legally insufficient.

[redacted]
Lt Col, USAFR
Prosecutor

Hodges, Keith

From: Hodges, Keith
Sent: Thursday, January 19, 2006 12:14 PM
To: [redacted]
Cc:
Subject: Trial/Session Term of the Military Commission - 27 Feb - 3 Mar 2006
Attachments: Referred Commission Cases - 18 Jan 06 v2.doc

This email is to provide long-range planning guidance to all counsel in the following cases:

United States v al Bahlul
United States v Khadr
United States v al Qahtani
United States v Barhoumi
United States v al Sharbi
United States v Muhammad

All counsel on all the above cases are to respond to the Assistant that you received this email. Defense, please also pay special attention to paragraph 6 below.

1. The Commission will hold a trial/session term the week of 27 February 2006 at Guantanamo Bay Naval Station, Cuba. Counsel in the above named cases must be prepared to conduct any and all business before the Commission that can be conducted at that time. The individual Presiding Officers, through the Assistant, will work with counsel to determine the exact business to be addressed. Collectively, the Presiding Officers will set the exact schedule and publish it at a later date.

2. The Office of the Presiding Officers is advised that there are no Muslim Holy days during the above period. If addressees have different information, please advise soonest.

3. The first session of the Commission may be held as early as 1300, 27 February 2006. The last session may be held as late as COB Friday, 3 March 2006.

4. The Presiding Officers request that counsel for those cases that will not be in session at GTMO during this term still be present at GTMO so that the parties and the PO can work together to discuss issues and make plans. For example, at the last term, the parties were able to discuss and agree on the wording of Protective Orders. The Presiding Officers are aware of the limitations on conferences and discussions versus what must be resolved in a session. All counsel should obtain the appropriate country clearances and make other necessary logistical arrangements.

5. If any counsel in the above listed cases cannot be at GTMO during the February trial/session term, advise the Assistant, and the Presiding Officer and opposing and other counsel on that case, **NLT 1200, EST (Monday) 23 January 2006** with the reasons for the unavailability.

6. All Defense counsel.

a. The fact that an attorney client relationship has not yet been established, or a client has indicated he wishes to proceed pro se, does not amount to "unavailability," and it may suggest a session in February is paramount. Counsel are encouraged to provide such information, however, as it might be useful in planning sessions.

b. Detailed Defense Counsel will advise if there are any other counsel (military or civilian) who are also detailed, or who may be detailed or may join the case in the future, and who are not on the attached list. If there are other such counsel, advise the Assistant, Presiding Officer, and other counsel on the case and provide email addresses and other contact information.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission

[redacted]

Referred
mmission Cases - 1

Referred Commission Cases – 18 Jan 06

Case	PO	Prosecution	Defense	Panel	Status
Hicks	Brownback	[redacted]	Mori – Det Lippert - Asst Dratel - Civ	05-0001 [redacted]	Stayed
al Qosi	Brownback		Shaeffer – Det Thompson - Asst	New panel ?	Stayed
Hamdan	Brownback		Swift – Det Autorino - Asst Katyal - Civ	New panel ?	Stayed
al Bahlul	Brownback		Fleener - Det	05-0003 [redacted]	First restart session held
Khadr	Chester		Merriam – Det Ahmad – Civ Wilson – Civ ?? Vokey	05-0004 [redacted]	First session held
al Qahtani	O'Toole		Broyles - Det	05-0008 [redacted]	
Barhoumi	O'Toole		Faulkner - Det	05-0007 [redacted]	
al Sharbi	O'Toole		Kuebler – Det	05-0006 [redacted]	
Muhammad	Kohlmann		Bradley – Det Stafford-Smith - Civ	05-0005 [redacted]	

UNITED STATES OF AMERICA v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL	Protective Order # 1 Protection of Identities of All Witnesses 23 January 2006

This Protective Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. This Protective Order protects the identities or other identifying information of all individuals identified in materials provided to the Defense by the prosecution. In addition, this Order also applies to any identifying information obtained by the Defense during their independent discovery efforts.

2. The names and background information of witnesses are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

   a. Names or other identifying information of witnesses that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

   b. Names or other identifying information of any witness shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of witnesses must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal; and

   c. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

4. Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

Peter E. Brownback, III
COL, IA, USA
Presiding Officer

UNITED STATES OF AMERICA

v.

ALI HAMZA AHMAD SULAYMAN AL BAHLUL

Protective Order # 2
Protection of Identities of Investigators and Interrogators

23 January 2006

This Protective Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. This Protective Order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of their government (collectively referred to as "investigators and interrogators") who participated in the investigation of the accused.

2. The names and background information of investigators and interrogators are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

a. Names or other identifying information of investigators and interrogators that have been or may, from time to time, be disseminated to Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below; and

b. Names or other identifying information of investigators and interrogators shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of investigators and interrogators must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.

4. The following actions do not violate this protective order:

a. Showing pictures of individuals who had questioned the accused for the purposes of discussing the nature of those interrogations with the accused;

b. Using "nicknames" or any other name (aliases) that the individual who questioned the accused told to the accused when questioned. This does NOT

include any name that the accused may have learned through some other means other than the individual themselves; and

c. Using physical descriptions of the individual who questioned the accused for the purposes of the defense discussing with the accused that specific interrogation.

5. The protective order protects the true identities of the individual from release to the accused and the public and of course any private information relating to the individual (family names, addresses, phone numbers, etc.).

6. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

7. Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

Peter E. Brownback, III
COL, JA, USA
Presiding Officer

UNITED STATES OF AMERICA

v.

ALI HAMZA AHMAD SULAYMAN AL BAHLUL

Protective Order # 3
Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings

23 January 2006

This Protective Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. **Generally:** The following Order is issued to provide general guidance regarding the below-described documents and information. Unless otherwise noted, required, or requested, it does not preclude the use of such documents or information in open court.

2. **Scope:** This Order pertains to information, in any form, provided or disclosed to the defense team in their capacity as legal representatives of the accused before a military commission. Protection of information in regards to litigation separate from this military commission would be governed by whatever protective orders are issued by the judicial officer having cognizance over that litigation.

3. **Definition of Prosecution and Defense:** For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants assisting the Defense in Military Commission proceedings against the accused. The term "Prosecution" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who participate in the prosecution, investigation, or interrogation of the accused.

4. **Effective Dates and Classified Information:** This Protective Order shall remain in effect until rescinded or modified by the Presiding Officer or other competent authority. This Order shall not be interpreted to suggest that information classified under the laws or regulations of the United States may be disclosed in a manner or to those persons inconsistent with those statutes or regulations.

5. UNCLASSIFIED SENSITIVE MATERIALS:

a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense ("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party

wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer.

b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

6. CLASSIFIED MATERIALS:

a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.

b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any post-trial U.S. federal litigation that may occur.

7. BOOKS, ARTICLES, OR SPEECHES:

a. FINALLY, IT IS ORDERED that neither members of the Defense team nor the Prosecution shall divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team or the Prosecution shall submit any book, article, speech, or other publication derived from, or based upon information gained in the course of representation of the accused in military commission proceedings to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.

b. The provisions in paragraph 7a apply to information learned in the course of representing the accused before this commission, no matter how that information was obtained. For example, paragraph 7a:

(1) Does not cover press conferences given immediately after a commission hearing answering questions regarding that hearing so long as it only addresses the aspects of the hearing that were open to the public.

(2) Does not cover public discourses of information or experiences in representing the accused before this military commission which is already known and available in the public forum, such as open commission hearings, and motions filed and made available to the public.

(3) Does cover information or knowledge obtained through any means, including experience, that is not in the public forum, and would and could only be known through such an intimate interaction in the commission process (for example, a defense counsel's experience logistically in meeting a client).

8. REQUEST FOR EXCEPTIONS: Either party may file a motion, under seal and in accordance with RCM 4-3 or 9-1 as appropriate, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

9. BREACH: Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

Peter E. Brownback, III
COL, JA, USA
Presiding Officer

Hodges, Keith

From: Sullivan, Dwight, COL, DoD OGC [redacted]
Sent: Tuesday, January 24, 2006 3:41 PM
To: 'Hodges, Keith'; Sullivan, Dwight, COL, DoD OGC; Pete Brownback
Cc: [redacted]
Subject: RE: PO 102 L RE: Request to Withdraw - MAJ Fleener - US v. Al Bahlul

Major Fleener is out of the office on TDY orders. I have forwarded the Presiding Officer's request for the letter to Major Fleener, but I do not know whether he has yet received that communication.

Respectfully submitted,
Dwight Sullivan

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions
[redacted]

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Tuesday, January 24, 2006 15:38
To: Sullivan, Dwight, COL, DoD OGC; Hodges, Keith; Pete Brownback
Cc: [redacted]
Subject: RE: PO 102 L RE: Request to Withdraw - MAJ Fleener - US v. Al Bahlul

Thank you, Col. Sullivan.

Is the request - whether from MAJ Fleener or you - forthcoming? If not, would you advise further please.

Thank you.

Keith Hodges

From: Sullivan, Dwight, COL, DoD OGC [redacted]
Sent: Tuesday, January 24, 2006 1:50 PM
To: 'Hodges, Keith'; Pete Brownback
Cc: [redacted]

RE 147 (al Bahlul)
Page 1 of 3

[redacted]
Subject: RE: PO 102 L RE: Request to Withdraw - MAJ Fleener - US v. Al Bahlul

I am writing to confirm that as Major Fleener stated on page 76 of the commission transcript in the case of United States v. al Bahlul, I orally denied Major Fleener's request to withdraw as detailed defense counsel.

Respectfully submitted,
Dwight Sullivan

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions
[redacted]

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Tuesday, January 24, 2006 12:39
To: Pete Brownback
Cc: [redacted]
Subject: PO 102 L RE: Request to Withdraw - MAJ Fleener - US v. Al Bahlul

To MAJ Fleener, Col. Sullivan, and COL Brownback,

1. I do not have, and have not been provided, copies of the request to withdraw mentioned in paragraph 1 below.

2. MAJ Fleener and Col. Sullivan, you are requested to provide copies of MAJ Fleener's request to withdraw.

3. Col. Sullivan and MAJ Fleener:

a. If the denial of the request has been reduced to writing, please provide that writing.

b. If the denial has not been reduced to writing, the Presiding Officer requests that Col. Sullivan confirm by email or other writing that he has denied MAJ Fleener's request.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback [redacted]
Sent: Tuesday, January 24, 2006 12:16 PM
To: keith - 1 - work
Subject: Request to Withdraw - MAJ Fleener - US v. Al Bahlul

Mr. Hodges,

During the commission session on 11 January 2006, MAJ Fleener stated that he had submitted two requests to withdraw from the case to the Chief Defense Counsel. When asked for copies of the requests, he stated that he did not have them with him, but he would provide copies at a later time. He further stated that the Chief Defense Counsel denied the requests orally, but did not provide a written denial.

If MAJ Fleener has provided the copies of the two requests to you, please forward them to me. If he has not, please forward this email MAJ Fleener and to all concerned in the Al Bahlul case, requesting that he immediately provide the copies.

In that same email, please ask the Chief Defense Counsel if the denials have been reduced to writing. If so, please request that copies of the denial be furnished. If not, please request that he confirm the denials by email.

COL Brownback

Hodges, Keith

From: Harvey, [redacted] Mr, DoD OGC [redacted]
Sent: Tuesday, January 24, 2006 1:38 PM
To: 'Hodges, Keith'
Cc: [redacted]
Subject: RE: al Bahlul Materials to the Iowa State Bar Association
Attachments: Iowa Bar Screen Shot.pdf; MCI 7 sent to Mr. [redacted] pdf; MCI 2 to Mr. [redacted] (20 Jan 06)1.pdf; [redacted] to Harvey (17 Jan 06).pdf; MCI 2 to Mr. [redacted] (20 Jan 06).pdf; Memo to Iowa Bar--Encls 1-2-5-6 (18 Jan 06).pdf

Mr. Hodges,

Attached to this email are the forwarding emails which provided documents to Mr. [redacted] The email concerning MCI 2 was sent twice because MCI 2 was not attached.

The attached screen shot document shows the items that I uploaded to Mr. [redacted] virtual office, as well as the descriptions I provided to him.

To summarize, I sent the following redacted documents to Mr. [redacted]

(1) Draft al Bahlul transcript pages 1-123.

(2) al Bahlul Review Exhibits 1-6 and 101-140.

(3) Army Standards of Conduct Opinion.

I sent the following unredacted documents to Mr. [redacted]

(1) Cover letter with enclosures 1-2 and 5.

M. Harvey
Chief Clerk of Military Commissions

RE 148 (al Bahlul)
Page 1 of 34

Harvey, [redacted] Mr, DoD OGC

From: [redacted]
Sent: Tuesday, January 17, 2006 18:06
To: harveym[redacted]
Subject: al Bahlul

[redacted]

I have added you to the Iowa State Bar Assn Ethics Committee's virtual office for the purpose of uploading .pdf. Please send me a copy of the entire public record. You can upload the files by going to the files section and following the directions. It will upload the entire file to our computer.

Our committee will attempt to respond to the tribunal within the next 3 weeks.

[redacted]

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DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CHIEF CLERK OF
MILITARY COMMISSIONS

January 18, 2006

MEMORANDUM FOR State Bar of Iowa, Attention Mr. [redacted] 521 East Locust, Des Moines, Iowa 50309-1939

SUBJECT: Additional Military Commission Materials

Pursuant to the Presiding Officer's e-mail request dated Jan. 17, 2006 in *United States v. al Bahlul* (Encl 1) and your email received that same day (Encl 2), the following materials are provided:

(1) Transcript pages 1-123 (Encl 3);
(2) Review Exhibits 1-6 and 120 to 140 (Encl 4);
(3) *United States v. Hamdan*, 415 F.3d 33 (DC Cir. 2005) (Encl 5); and,
(4) Army Standards of Conduct Office (SOCO) Opinion (Encl 6).

The most significant references regarding military commissions are available at the Department of Defense Military Commissions web site: http://www.defenselink.mil/news/commissions.html

For other records specifically pertaining to *United States v. al Bahlul*, go to the following web address: http://www.defenselink.mil/news/commissions_exhibits_bahlul.html. For example, the following references are available in Volume I of al Bahlul's allied papers: (1) President's Military Order, (2) Secretary of Defense's Military Orders, (3) Department of Defense General Counsel's Instructions, (4) Appointing Authority's Regulations, and (5) Presiding Officer's Memoranda.

Several of the volumes of *United States v. al Bahlul* at the preceding web address are between 10 and 15 megabytes in size. If you are unable to download them successfully from this web address, please send me an e-mail at harveym[redacted] At your request, I will split the volumes into parts smaller than 10 megabytes in size and then upload them into your virtual office.

When you review enclosures 1-4, you will notice that I have made several redactions to protect the personal privacy of some of the individuals in the records. (I have redacted your name, for example, from the letter Major Fleener sent to you, as well as from enclosure 2.) I will also be redacting

information, such as your names and address, from this letter before it is publicly released.

I have not redacted the names and/or email addresses of those other individuals who have indicated to me that redaction is not required. None of these records are classified. I have removed some review exhibits entirely from these records. In such circumstances, I have substituted a summary of the document. For further information about the rationale for removal of those exhibits, please see the summary itself.

I have provided the Army Standards of Conduct Office (SOCO) letter regarding whether Major Fleener can be ordered to represent an accused who does not desire his representation because the Presiding Officer has specifically asked me to provide it to you. Please regard it, however, as confidential (see the footer I have added to the letter at the request of SOCO).

Please also indicate on any opinion rendered by your committee whether or not it may be released as a public document, or should be handled in a similar manner to the Army SOCO Opinion.

A copy of this memorandum, and any response received from your office that is addressed to me will be provided to the Presiding Officer, Prosecution and Defense. It will also be filed in the Clerk of Military Commissions' section of the Allied Papers and attached to the record of trial after authentication.

Should you need any additional information feel free to call me at [redacted]

Thank you for your assistance.

//Signed//

M. Harvey
Chief Clerk of
Military Commissions

CC
Mr. Hodges (by email)
Major Fleener
Prosecution Team

Attachments:
As stated

Hodges, Keith

From: Hodges, Keith[redacted]
Sent: Tuesday, January 17, 2006 3:52 PM
To: Harvey,[redacted]
Cc: [redacted]
Subject: Request to Forward Materials to the Iowa State Bar Association and to the US Army Standards of Conduct Office

Mr. Harvey,

1. Please see Colonel Brownback's email below.

2. You are requested that when the materials have been sent, that you reply to this email and include the forwarding letter as an attachment. That email and attachment will be added to the filings inventory.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback[redacted]
Sent: Tuesday, January 17, 2006 3:39 PM
To: Hodges, Keith
Subject: Request to Forward Materials to the Iowa State Bar Association and to the US Army Standards of Conduct Office

Mr. Hodges,

Please forward the below email to Mr. Harvey and copy all interested parties in US v. Al Bahlul.

COL Brownback

Mr.[redacted]Harvey
Chief Clerk of Military Commissions

A request for opinion in a matter concerning the Military Commission case of United States v. Al Bahlul was sent to the Iowa State Bar Association on 3 January 2006 (RE 128) and to the US Army Standards of Conduct Office (SOCO) on 4 January 2006 (RE 130).

As you are the custodian for all records of trial by military commission, I request that you forward the following Review Exhibits (RE) and other materials to the Iowa State Bar Association, so that their opinion, if any, when rendered can be based on a more complete account -- both factually and legally -- of the issue of representation in Al Bahlul.

a. The entire PO 102 series of documents
b. The current draft transcript of the 11 January 2006 session
c. The Circuit Court opinion in US v. Hamdan.

I also request that you advise the Iowa State Bar Association that the written ruling on Mr. Al Bahlul's pro se request will be issued around the end of January 2006 and that you will make it available to them immediately thereafter.

I would further request that if the Iowa State Bar Association wishes any other material that you provide it to them as soon as possible.

I request that you also forward the current draft transcript of the 11 January 2006 session to SOCO and advise them of the pending written ruling on Mr. Al Bahlul's request.

In making these requests to you, I realize that you will be forwarding documents which may or will have had sensitive information redacted and that you may insert, where necessary, disclosure (or non-disclosure) statements - either in the text of the document or in footers thereto.

Please insure that you provide a copy of all materials forwarded under this request to Mr. Hodges, the Assistant to the Presiding Officer.

Please note that there may be a future request for opinion in this case. However, the only parties to whom I wish matters forwarded at this time are Iowa and SOCO. If another request is made, I will be so advised promptly and I feel certain that the matters attached to any future request will contain all of the materials outlined above.

A copy of this email has been provided to the counsel in US v. al Bahlul.

Peter E. Brownback III
COL, JA
Presiding Officer

Harvey, [redacted] Mr, DoD OGC

From: [redacted]
Sent: Tuesday, January 17, 2006 18:06
To: harveym@[redacted]
Subject: al Bahlul

M[redacted]

I have added you to the Iowa State Bar Assn Ethics Committee's virtual office for the purpose of uploading .pdf. Please send me a copy of the entire public record. You can upload the files by going to the files section and following the directions. It will upload the entire file to our computer.

Our committee will attempt to respond to the tribunal within the next 3 weeks.

[redacted]

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SALIM AHMED **HAMDAN,** APPELLEE v. DONALD H. **RUMSFELD,** UNITED STATES SECRETARY OF DEFENSE, ET AL., APPELLANTS

No. 04-5393

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2005 U.S. App. LEXIS 14315

April 7, 2005, Argued
July 15, 2005, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of Columbia. (04cv01519). **Hamdan** v. **Rumsfeld,** 344 F. Supp. 2d 152, 2004 U.S. Dist. LEXIS 22724 (D.D.C., 2004)

CASE SUMMARY

CORE TERMS: military, military commission, treaty, signatory, enforceable,

individual rights, regulation, court-martial, enemy, prisoner of war, civilian, tribunal, captured, joint resolution, terrorism, competent tribunal, armed conflict, habeas corpus, courts-martial, military order, armed forces, civil war, combatant, camp, jurisdictional, indispensable, civilized, armed, non-state, pronounced

LexisNexis(R) Headnotes ◆ Hide Headnotes

Criminal Law & Procedure > Habeas Corpus > Exhaustion of Remedies
Military & Veterans Law > Military Justice > Appeals & Reviews > Finality
Military & Veterans Law > Military Justice > Jurisdiction > Lack of Jurisdiction
Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN1 A person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him. More Like This Headnote

Constitutional Law > Congressional Duties & Powers > Lower Federal Courts

HN2 U.S. Const. art. I, § 8 gives Congress the power to constitute tribunals inferior to the United States Supreme Court. More Like This Headnote

Governments > Federal Government > Domestic Security
Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN3 The President's Military Order of November 13, 2001, states that any person subject to the order, including members of al Qaeda, shall, when tried, be tried by a military commission for any and all offenses triable by a military commission that such individual is alleged to have committed. 66 Fed. Reg. at 57,834. More Like This Headnote

Constitutional Law > Congressional Duties & Powers > War Powers Clause
Governments > Federal Government > Domestic Security

HN4 In a joint resolution, passed in response to the attacks of September 11, 2001, Congress authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the attacks and recognized the President's authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). More Like This Headnote

Governments > Federal Government > Domestic Security
International Law > Dispute Resolution > Laws of War

HN5 An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede the military effort, have violated the law of war. The trial and punishment of enemy combatants is thus part of the conduct of war. More Like This Headnote

Governments > Federal Government > Domestic Security

Military & Veterans Law > Military Justice > Jurisdiction > Exclusive & Nonexclusive Jurisdiction

HN6 10 U.S.C.S. § 821 states that court-martial jurisdiction does not deprive military commissions of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions. Congress also authorized the President, in another provision to establish procedures for military commissions. 10 U.S.C.S. § 836(a). More Like This Headnote

Constitutional Law > Supremacy Clause

International Law > Treaty Formation

HN7 See U.S. Const. art. VI, cl. 2.

International Law > Treaty Formation

International Law > Treaty Interpretation

HN8 The United States of America has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights. More Like This Headnote

International Law > Treaty Formation

International Law > Treaty Interpretation

HN9 As a general matter, a treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. More Like This Headnote

International Law > Dispute Resolution

International Law > Treaty Interpretation

HN10 If a treaty is violated, this becomes the subject of international negotiations and reclamation, not the subject of a lawsuit. More Like This Headnote

International Law > Treaty Interpretation

HN11 International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. More Like This Headnote

Governments > Courts > Authority to Adjudicate

International Law > Treaty Interpretation

HN12 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, ratified in 1955, cannot be judicially enforced. More Like This Headnote

International Law > Dispute Resolution > Laws of War

International Law > Treaty Interpretation

HN13 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Common art. 1, 6 U.S.T. 3316, ratified in 1955, states that parties to the Convention undertake to respect and to ensure respect for the Convention in all

circumstances. More Like This Headnote

International Law > Treaty Interpretation

HN14 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 8, 6 U.S.T. 3316, ratified in 1955, states that its provisions are to be applied with the cooperation and under the scrutiny of the Protecting Powers. More Like This Headnote

International Law > Dispute Resolution > Arbitration & Mediation

International Law > Treaty Interpretation

HN15 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 132, 6 U.S.T. 3316, ratified in 1955, provides that at the request of a party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention. If no agreement is reached about the procedure for the enquiry, Article 132 further provides that the parties should agree on the choice of an umpire who will decide upon the procedure to be followed. More Like This Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action

Governments > Courts > Authority to Adjudicate

HN16 That a court has jurisdiction over a claim does not mean the claim is valid. More Like This Headnote

Criminal Law & Procedure > Habeas Corpus > Habeas Corpus Procedure

Governments > Legislation > Statutory Remedies & Rights

International Law > Treaty Interpretation

HN17 The availability of habeas corpus may obviate a petitioner's need to rely on a private right of action, but it does not render a treaty judicially enforceable. More Like This Headnote

International Law > Treaty Interpretation

Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN18 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 102, 6 U.S.T. 3316, ratified in 1955, provides that a prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Terrorism

International Law > Treaty Interpretation

HN19 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, ratified in 1955, does not apply to al Qaeda and its members. More Like This Headnote

International Law > Dispute Resolution > Laws of War

International Law > Treaty Interpretation

HN20 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, ratified in 1955, appears to contemplate only two types of armed conflicts. The first is an international conflict. Under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Common art. 2, 6 U.S.T. 3316, ratified in 1955, the provisions of the Convention apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. There is an exception, set forth in the last paragraph of Common article 2, when one of the "Powers" in a conflict is not a signatory but the other is. Then the signatory nation is bound to adhere to the Convention so long as the opposing Power accepts and applies the provisions thereof. More Like This Headnote

International Law > Dispute Resolution > Laws of War
International Law > Treaty Interpretation

HN21 The second type of conflict covered by the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Common art. 3, 6 U.S.T. 3316, ratified in 1955, is a civil war -- that is, an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. In that situation, Common article 3 prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by a civilized people. More Like This Headnote

Constitutional Law > The Presidency
International Law > Treaty Interpretation

HN22 Under the Constitution, the President has a degree of independent authority to act in foreign affairs, and, for this reason and others, his construction and application of treaty provisions is entitled to great weight. More Like This Headnote

Governments > Courts > Authority to Adjudicate
International Law > Treaty Interpretation
Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN23 A requirement in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Common art. 3(1)(d), 6 U.S.T. 3316, ratified in 1955, is that sentences must be pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. More Like This Headnote

Constitutional Law > The Presidency
Governments > Federal Government > Domestic Security
Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN24 See Unif. Code Mil. Justice art. 36, 10 U.S.C.S. § 836.

Constitutional Law > The Presidency

Governments > Federal Government > Domestic Security
Military & Veterans Law > Military Justice > Trials

HN25 In establishing military commissions, the President may not adopt procedures that are contrary to or inconsistent with the Uniform Code of Military Justice's provisions governing military commissions. In particular, Unif. Code Mil. Justice art. 39, 10 U.S.C.S. § 839, requires that sessions of a trial by court-martial shall be conducted in the presence of the accused. More Like This Headnote

Military & Veterans Law > Military Justice > Court Members
Military & Veterans Law > Military Justice > Judges
Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN26 The Uniform Code of Military Justice imposes only minimal restrictions upon the form and function of military commissions. More Like This Headnote

International Law > Treaty Interpretation
Military & Veterans Law > Military Justice > Pretrial Restraint > Pretrial Confinement

HN27 Army Reg. 190-8, which contains many subsections, implements international law, both customary and codified, relating to enemy prisoners of war, retained personnel, civilian internees, and other detainees which includes those persons held during military operations other than war. Army Reg. 190-8, § 1-1(b). The regulation lists the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, ratified in 1955, among the principal treaties relevant to the regulation. Army Reg. 190-8, § 1-1(b)(3). One subsection, Army Reg. 190-8, § 1-5(a)(2), requires that prisoners receive the protections of the Convention until some other legal status is determined by competent authority. More Like This Headnote

Military & Veterans Law > Military Justice > Court Members
Military & Veterans Law > Military Justice > Judges

HN28 Army regulations specify that a competent tribunal shall be composed of three commissioned officers, one of whom must be field-grade. Army Regs. 190-8 § 1.6(c). A field-grade officer is an officer above the rank of captain and below the rank of brigadier general -- a major, a lieutenant colonel, or a colonel. More Like This Headnote

Constitutional Law > The Presidency
Governments > Federal Government > Domestic Security
Military & Veterans Law > Military Justice > Court Members
Military & Veterans Law > Military Justice > Judges

HN29 The President's Order concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism requires military commissions to be composed of between three and seven commissioned officers. 32 C.F.R. § 9.4(a). More Like This Headnote

COUNSEL: Peter D. Keisler, Assistant Attorney General, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were Paul D. Clement, Acting Solicitor General, Gregory G. Katsas, Deputy Assistant Attorney General, Kenneth L. Wainstein, U.S. Attorney, Douglas N. Letter, Robert M. Loeb, August Flentje, Sharon Swingle, Eric Miller and Stephan E. Oestreicher, Jr., Attorneys.

Daniel J. Popeo and Richard A. Samp were on the brief of amici curiae Washington Legal Foundation and Allied Educational Foundation in support of appellants.

Jay Alan Sekulow and James M. Henderson, Jr. were on the brief of amicus curiae The American Center for Law & Justice supporting appellants.

Neal K. Katyal and Charles Swift, pro hac vice, argued the cause for appellee. With them on the briefs were Benjamin S. Sharp, Kelly A. Cameron, Harry H. Schneider, Jr., Joseph M. McMillan, David R. East, and Charles C. Sipos.

Carlos M. Vazquez and David C. Vladeck were on the brief of amici curiae of fifteen law professors in support of appellee.

David R. Berz was on the brief for amici curiae **[*2]** Louise Doswald-Beck, et al. in support of appellee.

Jordan J. Paust was on the brief for amicus curiae International Law and National Security Law Professors in support of appellee.

Jenny S. Martinez, appearing Pro se, was on the brief for amici curiae Jenny S. Martinez and Allison Marston Danner.

Mary J. Moltenbrey was on the brief for amici curiae 305 United Kingdom and European Parliamentarians in support of appellee.

Gary S. Thompson was on the brief for amici curiae Eleven Legal Scholars in support of appellee.

Philip Sundel, Attorney, Office of Chief Defense Counsel, was on the brief for amicus curiae Military Attorneys Detailed to Represent Ali Hamza Ahmad Sulayman Al Bahlul in support of appellee.

Kurt J. Hamrock and Phillip E. Carter were on the brief for amici curiae Military Law Practitioners and Academicians Kevin J. Barry, et al. in support of appellee.

Blair G. Brown was on the brief for amicus curiae National Association of Criminal Defense Lawyers, Inc. in support of appellee.

Elisa C. Massimino was on the brief for amici curiae Human Rights First, et al. in support of appellee.

David H. Remes was on the brief for amici curiae **[*3]** General Merrill A. McPeak, et al. in support of appellee.

Jonathan M. Freiman was on the brief for amici curiae People for the American Way Foundation, et al. in support of appellee.

Morton Sklar was on the brief for amicus curiae The World Organization for Human Rights USA in support of appellee.

Jonathan L. Hafetz was on the brief for amicus curiae Louis Fisher in support of appellee.

Alan I. Horowitz was on the brief for amicus curiae Noah Feldman in support of appellee.

Christopher J. Wright and Timothy J. Simeone were on the brief for amicus curiae Urban Morgan Institute for Human Rights in support of appellee.

James J. Benjamin, Jr., Nancy Chung, Amit Kurlekar, Steven M. Pesner, and Laura K. Soong were on the brief for amicus curiae The Association of the Bar of the City of New York in support of appellee.

JUDGES: Before: RANDOLPH and ROBERTS, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge RANDOLPH. Concurring opinion filed by Senior Circuit Judge WILLIAMS.

OPINIONBY: RANDOLPH

OPINION: RANDOLPH, *Circuit Judge*: Afghani militia forces captured Salim Ahmed Hamdan in Afghanistan in late November 2001. Hamdan's **[*4]** captors turned him over to the American military, which transported him to the Guantanamo Bay Naval Base in Cuba. The military initially kept him in the general detention facility, known as Camp Delta. On July 3, 2003, the President determined "that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." This finding brought Hamdan within the compass of the President's November 13, 2001, Order concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833. Accordingly, Hamdan was designated for trial before a military commission.

In December 2003, Hamdan was removed from the general population at Guantanamo and placed in solitary confinement in Camp Echo. That same month, he was appointed counsel, initially for the limited purpose of plea negotiation. In April 2004, Hamdan filed this petition for habeas corpus. While his petition was pending before the district court, the government formally charged Hamdan with conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged **[*5]** belligerent, and terrorism. The charges alleged that Hamdan was Osama bin Laden's personal driver in Afghanistan between 1996 and November 2001, an allegation Hamdan admitted in an affidavit. The charges further alleged that Hamdan served as bin Laden's personal bodyguard, delivered weapons to al Qaeda members, drove bin Laden to al Qaeda training camps and safe havens in Afghanistan, and trained at the al Qaeda-sponsored al Farouq camp. Hamdan's trial was to be before a military commission, which the government tells us now consists of three officers of the rank of colonel. Brief for Appellants at 7.

In response to the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004), Hamdan received a formal hearing before a Combatant Status Review Tribunal. The Tribunal affirmed his status as an enemy combatant, "either a member of or affiliated with Al Qaeda," for whom

continued detention was required.

On November 8, 2004, the district court granted in part

Hamdan's petition. Among other things, the court held that Hamdan could not be tried by a military commission unless a competent tribunal determined that he was not a **[*6]** prisoner of war under the 1949 Geneva Convention governing the treatment of prisoners. The court therefore enjoined the Secretary of Defense from conducting any further military commission proceedings against Hamdan. This appeal followed.

I.

The government's initial argument is that the district court should have abstained from exercising jurisdiction over Hamdan's habeas corpus petition. *Ex parte Quirin v. Cox*, 317 U.S. 1, 87 L. Ed. 3, 63 S. Ct. 2 (1942), in which captured German saboteurs challenged the lawfulness of the military commission before which they were to be tried, provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions. The Supreme Court ruled against the petitioners in *Quirin*, but only after considering their arguments on the merits. In an effort to minimize the precedential effect of *Quirin*, the government points out that the decision predates the comity-based abstention doctrine recognized in *Schlesinger v. Councilman*, 420 U.S. 738, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1975), and applied by this court in *New v. Cohen*, 327 U.S. App. D.C. 147, 129 F.3d 639 (D.C. Cir. 1997). **[*7]** *Councilman* and *New* hold only that civilian courts should not interfere with ongoing court-martial proceedings against citizen servicemen. The cases have little to tell us about the proceedings of military commissions against alien prisoners. The serviceman in *Councilman* wanted to block his court-martial for using and selling marijuana; the serviceman in *New* wanted to stop his court-martial for refusing to obey orders. The rationale of both cases was that a battle-ready military must be able to enforce "a respect for duty and discipline without counterpart in civilian life," *Councilman*, 420 U.S. at 757, and that "comity aids the military judiciary in its task of maintaining order and discipline in the armed services," *New*, 129 F.3d at 643. These concerns do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value.

Even within the framework of *Councilman* and *New*, there is an exception to abstention: HN1"a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him." *New*, 129 F.3d at 644. The theory is that setting **[*8]** aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction. *See Abney v. United States*, 431 U.S. 651, 662, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977). The courts in *Councilman* and *New* did not apply this exception because the servicemen had not "raised *substantial* arguments denying the right of the military to try them at all." *New*, 129 F.3d at 644 (citing *Councilman*, 420 U.S. at 759). Hamdan's jurisdictional challenge, by contrast, is not insubstantial, as our later discussion should demonstrate. While he does not deny the military's authority to try him, he does contend that a military commission has no jurisdiction over him and that any trial must be by court-martial. His claim, therefore, falls within the exception to *Councilman* and, in any event, is firmly supported by the Supreme Court's disposition of *Quirin*.

II.

In an argument distinct from his claims about the Geneva Convention, which we will discuss next, Hamdan maintains that the President violated the separation of powers inherent in the Constitution when he established military commissions. **[*9]** The argument is that HN2 Article I, § 8, of the Constitution gives Congress the power "to constitute Tribunals inferior to the supreme Court," that Congress has not established military commissions, and that the President has no inherent authority to do so under Article II. *See* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1284-85 (2002).

There is doubt that this separation-of-powers claim properly may serve as a basis for a court order halting a trial before a military commission, *see United States v. Cisneros*, 335 U.S. App. D.C. 135, 169 F.3d 763, 768-69 (D.C. Cir. 1999), and there is doubt that someone in Hamdan's position is entitled to assert such a constitutional claim, *see People's Mojahedin Org. v. Dep't of State*, 337 U.S. App. D.C. 106, 182 F.3d 17, 22 (D.C. Cir. 1999); *32 County Sovereignty Comm. v. Dep't of State*, 352 U.S. App. D.C. 93, 292 F.3d 797, 799 (D.C. Cir. 2002). In any event, on the merits there is little to Hamdan's argument.

HN3 The President's Military Order of November 13, 2001, stated that any person subject to the order, **[*10]** including members of al Qaeda, "shall, when tried, be tried by a military commission for any and all offenses triable by [a] military commission that such individual is alleged to have committed . . .." 66 Fed. Reg. at 57,834. The President relied on four sources of authority: his authority as Commander in Chief of the Armed Forces, U.S. CONST., art. II, § 2; Congress's joint resolution authorizing the use of force; 10 U.S.C. § 821; and 10 U.S.C. § 836. The last three are, of course, actions of Congress.

HN4 In the joint resolution, passed in response to the attacks of September 11, 2001, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks and recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). *In re Yamashita*, 327 U.S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946), which dealt with the validity of **[*11]** a military commission, held that HN5 an "important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *Id.* at 11. "The trial and punishment of enemy combatants," the Court further held, is thus part of the "conduct of war." *Id.* We think it no answer to say, as Hamdan does, that this case is different because Congress did not formally declare war. It has been suggested that only wars between sovereign nations would qualify for such a declaration. *See* John M. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV. 899, 918 (2003). Even so, the joint resolution "went as far toward a declaration of war as it might, and as far or further than Congress went in the Civil War, the Philippine Insurrection, the Boxer Rebellion, the Punitive Expedition against Pancho Villa, the Korean War, the Vietnam War, the invasion of Panama, the Gulf War, and numerous other **[*12]** conflicts." *Id.* at 917. The plurality in *Hamdi v. Rumsfeld*, in suggesting that a military commission could determine whether an American citizen was an enemy combatant

in the current conflict, drew no distinction of the sort Hamdan urges upon us. 124 S. Ct. at 2640-42.

Ex parte Quirin also stands solidly against Hamdan's argument. The Court held that Congress had authorized military commissions through Article 15 of the Articles of War. *Ex parte Quirin v. Cox*, 317 U.S. 1 at 28-29, 87 L. Ed. 3; *accord In re Yamashita*, 327 U.S. at 19-20. The modern version of Article 15 is 10 U.S.C. § 821, which the President invoked when he issued his military order. [HN6] Section 821 states that court-martial jurisdiction does not "deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." Congress also authorized the President, in another provision the military order cited, to establish procedures for military commissions. 10 U.S.C. § 836(a). Given these provisions and **[*13]** *Quirin* and *Yamashita*, it is impossible to see any basis for Hamdan's claim that Congress has not authorized military commissions. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2129-31 (2005). He attempts to distinguish *Quirin* and *Yamashita* on the ground that the military commissions there were in "war zones" while Guantanamo is far removed from the battlefield. We are left to wonder why this should matter and, in any event, the distinction does not hold: the military commission in *Quirin* sat in Washington, D.C., in the Department of Justice building; the military commission in *Yamashita* sat in the Phillipines after Japan had surrendered.

We therefore hold that through the joint resolution and the two statutes just mentioned, Congress authorized the military commission that will try Hamdan.

III.

This brings us to Hamdan's argument, accepted by the district court, that the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("1949 Geneva Convention"), ratified in 1955, may be enforced in federal court.

[HN7] "Treaties **[*14]** made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST., art. VI, cl. 2. Even so, [HN8] this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights. *See Holmes v. Laird*, 148 U.S. App. D.C. 187, 459 F.2d 1211, 1220, 1222 (D.C. Cir. 1972); *Canadian Transport Co. v. United States*, 214 U.S. App. D.C. 138, 663 F.2d 1081, 1092 (D.C. Cir. 1980). [HN9] As a general matter, a "treaty is primarily a compact between independent nations," and "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it." *Head Money Cases, Edye and Another v. Robertson*, 112 U.S. 580, 598, 28 L. Ed. 798, 5 S. Ct. 247, Treas. Dec. 6714 (1884). [HN10] If a treaty is violated, this "becomes the subject of international negotiations and reclamation," not the subject of a lawsuit. *Id.*; *see Charlton v. Kelly*, 229 U.S. 447, 474, 57 L. Ed. 1274, 33 S. Ct. 945(1913); *Whitney v. Robertson*, 124 U.S. 190, 194-95, 31 L. Ed. 386, 8 S. Ct. 456 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 306, 314, 7 L. Ed. 415 (1829), **[*15]** *overruled on other grounds, United States v. Percheman*, 32 U.S. (7 Pet.) 51, 8 L. Ed. 604 (1883).

Thus, [HN11] "international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of

action in domestic courts." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a, at 395 (1987). The district court nevertheless concluded that the 1949 Geneva Convention conferred individual rights enforceable in federal court. We believe the court's conclusion disregards the principles just mentioned and is contrary to the Convention itself. To explain why, we must consider the Supreme Court's treatment of the Third Geneva Convention of 1929 in *Johnson v. Eisentrager*, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950), and this court's decision in *Holmes v. Laird*, neither of which the district court mentioned.

In *Eisentrager*, German nationals, convicted by a military commission in China of violating the laws of war and imprisoned in Germany, sought writs of habeas corpus in federal district court on the ground that the military commission **[*16]** violated their rights under the Constitution and their rights under the 1929 Geneva Convention. 339 U.S. at 767. The Supreme Court, speaking through Justice Jackson, wrote in an alternative holding that the Convention was not judicially enforceable: the Convention specifies rights of prisoners of war, but "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14. We relied on this holding in *Holmes v. Laird*, 459 F.2d at 1222, to deny enforcement of the individual rights provisions contained in the NATO Status of Forces Agreement, an international treaty.

This aspect of *Eisentrager* is still good law and demands our adherence. *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004), decided a different and "narrow" question: whether federal courts had jurisdiction under 28 U.S.C. § 2241 "to consider challenges to the legality of the detention of foreign nationals" at Guantanamo Bay. *Id.* at 2690. The Court's decision in *Rasul* had nothing to say about enforcing any Geneva Convention. Its holding that federal courts had **[*17]** habeas corpus jurisdiction had no effect on *Eisentrager*'s interpretation of the 1929 Geneva Convention. That interpretation, we believe, leads to the conclusion that HN12 the 1949 Geneva Convention cannot be judicially enforced.

Although the government relied heavily on *Eisentrager* in making its argument to this effect, Hamdan chose to ignore the decision in his brief. Nevertheless, we have compared the 1949 Convention to the 1929 Convention. There are differences, but none of them renders *Eisentrager*'s conclusion about the 1929 Convention inapplicable to the 1949 Convention. HN13 Common Article 1 of the 1949 Convention states that parties to the Convention "undertake to respect and to ensure respect for the present Convention in all circumstances." The comparable provision in the 1929 version stated that the "Convention shall be respected . . . in all circumstances." Geneva Convention of 1929, art. 82. The revision imposed upon signatory nations the duty not only of complying themselves but also of making sure other signatories complied. Nothing in the revision altered the method by which a nation would enforce compliance. HN14 Article 8 of the 1949 Convention states that its provisions **[*18]** are to be "applied with the cooperation and under the scrutiny of the Protecting Powers . . .." This too was a feature of the 1929 Convention. *See* Geneva Convention of 1929, art. 86. But Article 11 of the 1949 Convention increased the role of the protecting power, typically the International Red Cross, when disputes arose: "In cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement." Here again there is no suggestion of judicial enforcement. The same is true with respect to the other method set forth in the 1949 Convention for settling

disagreements. [HN15]Article 132 provides that "at the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention." If no agreement is reached about the procedure for the "enquiry," Article 132 further provides that "the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed."

Hamdan points out that the 1949 Geneva Convention **[*19]** protects individual rights. But so did the 1929 Geneva Convention, as the Court recognized in *Eisentrager*, 339 U.S. at 789-90. The NATO Status of Forces Agreement, at issue in *Holmes v. Laird*, also protected individual rights, but we held that the treaty was not judicially enforceable. 459 F.2d at 1222.

Eisentrager also answers Hamdan's argument that the habeas corpus statute, 28 U.S.C § 2241, permits courts to enforce the "treaty-based individual rights" set forth in the Geneva Convention. The 1929 Convention specified individual rights but as we have discussed, the Supreme Court ruled that these rights were to be enforced by means other than the writ of habeas corpus. The Supreme Court's *Rasul* decision did give district courts jurisdiction over habeas corpus petitions filed on behalf of Guantanamo detainees such as Hamdan. But *Rasul* did not render the Geneva Convention judicially enforceable. [HN16]That a court has jurisdiction over a claim does not mean the claim is valid. *See* *Bell v. Hood*, 327 U.S. 678, 682-83, 90 L. Ed. 939, 66 S. Ct. 773 (1946). [HN17]The availability of habeas may obviate a petitioner's need to rely **[*20]** on a private right of action, *see* *Wang v. Ashcroft*, 320 F.3d 130, 140-41 & n.16 (2d Cir. 2003), but it does not render a treaty judicially enforceable.

We therefore hold that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court. *See* *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978).

IV.

Even if the 1949 Geneva Convention could be enforced in court, this would not assist Hamdan. He contends that a military commission trial would violate his rights under [HN18]Article 102, which provides that a "prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." One problem for Hamdan is that he does not fit the Article 4 definition of a "prisoner of war" entitled to the protection of the Convention. He does not purport to be a member of a group who displayed "a fixed distinctive sign recognizable at a distance" and who conducted "their operations in accordance with the laws and customs of war." *See* 1949 Convention, arts. 4A(2)(b), (c) & (d). If Hamdan were to claim **[*21]** prisoner of war status under Article 4A(4) as a person who accompanied "the armed forces without actually being [a] member[] thereof," he might raise that claim before the military commission under Army Regulation 190-8. *See* Section VII of this opinion, *infra*. (We note that Hamdan has not specifically made such a claim before this court.)

Another problem for Hamdan is that [HN19]the 1949 Convention does not apply to al Qaeda and its members. [HN20]The Convention appears to contemplate only two types of armed conflicts. The first is an international conflict. Under Common Article 2, the provisions of the Convention apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties,

even if the state of war is not recognized by one of them." Needless to say, al Qaeda is not a state and it was not a "High Contracting Party." There is an exception, set forth in the last paragraph of Common Article 2, when one of the "Powers" in a conflict is not a signatory but the other is. Then the signatory nation is bound to adhere to the Convention so long as the opposing Power "accepts and applies the provisions thereof." Even if **[*22]** al Qaeda could be considered a Power, which we doubt, no one claims that al Qaeda has accepted and applied the provisions of the Convention.

HN21 The second type of conflict, covered by Common Article 3, is a civil war --that is, an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .." In that situation, Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by a civilized people." Hamdan assumes that if Common Article 3 applies, a military commission could not try him. We will make the same assumption *arguendo*, which leaves the question whether Common Article 3 applies. Afghanistan is a "High Contracting Party." Hamdan was captured during hostilities there. But is the war against terrorism in general and the war against al Qaeda in particular, an "armed conflict not of an international character"? *See* INT'L COMM. RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (1960) (Common Article 3 applies **[*23]** only to armed conflicts confined to "a single country"). President Bush determined, in a memorandum to the Vice President and others on February 7, 2002, that it did not fit that description because the conflict was "international in scope." The district court disagreed with the President's view of Common Article 3, apparently because the court thought we were not engaged in a separate conflict with al Qaeda, distinct from the conflict with the Taliban. We have difficulty understanding the court's rationale. Hamdan was captured in Afghanistan in November 2001, but the conflict with al Qaeda arose before then, in other regions, including this country on September 11, 2001. HN22 Under the Constitution, the President "has a degree of independent authority to act" in foreign affairs, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414, 156 L. Ed. 2d 376, 123 S. Ct. 2374 (2003), and, for this reason and others, his construction and application of treaty provisions is entitled to "great weight." United States v. Stuart, 489 U.S. 353, 369, 103 L. Ed. 2d 388, 109 S. Ct. 1183 (1989); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 185, 72 L. Ed. 2d 765, 102 S. Ct. 2374 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194, 6 L. Ed. 2d 218, 81 S. Ct. 922 (1961). **[*24]** While the district court determined that the actions in Afghanistan constituted a single conflict, the President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986). To the extent there is ambiguity about the meaning of Common Article 3 as applied to al Qaeda and its members, the President's reasonable view of the provision must therefore prevail.

V.

Suppose we are mistaken about Common Article 3. Suppose it does cover Hamdan. Even then we would abstain from testing the military commission against HN23 the requirement in Common Article 3(1)(d) that sentences must be pronounced "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See* Councilman, 420 U.S. at 759; New, 129

F.3d at 644; *supra* Part I. Unlike his arguments that the military commission lacked jurisdiction, his argument here is that the commission's procedures particularly its alleged failure **[*25]** to require his presence at all stages of the proceedings -- fall short of what Common Article 3 requires. The issue thus raised is not *whether* the commission may try him, but rather *how* the commission may try him. That is by no stretch a jurisdictional argument. No one would say that a criminal defendant's contention that a district court will not allow him to confront the witnesses against him raises a jurisdictional objection. Hamdan's claim therefore falls outside the recognized exception to the *Councilman* doctrine. Accordingly, comity would dictate that we defer to the ongoing military proceedings. If Hamdan were convicted, and if Common Article 3 covered him, he could contest his conviction in federal court after he exhausted his military remedies.

VI.

After determining that the 1949 Geneva Convention provided Hamdan a basis for judicial relief, the district court went on to consider the legitimacy of a military commission in the event Hamdan should eventually appear before one. In the district court's view, the principal constraint on the President's power to utilize such commissions is found in Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836, **[*26]** which provides:

HN24 Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter.*

(Emphasis added.) The district court interpreted the final qualifying clause to mean that military commissions must comply in all respects with the requirements of the Uniform Code of Military Justice (UCMJ). This was an error.

Throughout its Articles, the UCMJ takes care to distinguish between "courts-martial" and "military commissions." *See, e.g.*, 10 U.S.C. § 821 (noting that "provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction"). The terms are not used interchangeably, and the majority of the UCMJ's procedural requirements refer only to courts-martial. **[*27]** The district court's approach would obliterate this distinction. A far more sensible reading is that HN25 in establishing military commissions, the President may not adopt procedures that are "contrary to or inconsistent with" the UCMJ's provisions governing military commissions. In particular, Article 39 requires that sessions of a "trial by *court-martial*. . . shall be conducted in the presence of the accused." Hamdan's trial before a *military commission* does not violate Article 36 if it omits this procedural guarantee.

The Supreme Court's opinion in *Madsen v. Kinsella*, 343 U.S. 341, 96 L. Ed. 988, 72 S. Ct. 699 (1952), provides further support for this reading of the UCMJ. There, the Court spoke of the place of military commissions in our history, referring to them as "our commonlaw war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute." *Id.* at 346-48. The Court issued its opinion two years after enactment of the UCMJ, and it is difficult, if not impossible, to square the Court's language in *Madsen* with the sweeping effect with which the district court

would invest Article 36. HN26 The UCMJ thus imposes only minimal **[*28]** restrictions upon the form and function of military commissions, *see, e.g.*, 10 U.S.C. §§ 828, 847(a)(1), 849(d), and Hamdan does not allege that the regulations establishing the present commission violate any of the pertinent provisions.

VII.

Although we have considered all of Hamdan's remaining contentions, the only one requiring further discussion is his claim that even if the Geneva Convention is not judicially enforceable, Army Regulation 190-8 provides a basis for relief. HN27 This regulation, which contains many subsections, "implements international law, both customary and codified, relating to [enemy prisoners of war], [retained personnel], [civilian internees], and [other detainees] which includes those persons held during military operations other than war." AR 190-8 § 1-1(b). The regulation lists the Geneva Convention among the "principal treaties relevant to this regulation." § 1-1(b)(3); *see Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring) (describing AR 190-8 as "implementing the Geneva Convention"). One subsection, § 1-5(a)(2), requires that prisoners receive the protections of the Convention "until some other legal **[*29]** status is determined by competent *authority*." (Emphasis added.) The President found that Hamdan was not a prisoner of war under the Convention. Nothing in the regulations, and nothing Hamdan argues, suggests that the President is not a "competent authority" for these purposes.

Hamdan claims that AR 190-8 entitles him to have a "competent tribunal" determine his status. But we believe the military commission is such a tribunal. HN28 The regulations specify that such a "competent tribunal" shall be composed of three commissioned officers, one of whom must be field-grade. AR 190-8 § 1.6(c). A field-grade officer is an officer above the rank of captain and below the rank of brigadier general -- a major, a lieutenant colonel, or a colonel. HN29 The President's order requires military commissions to be composed of between three and seven commissioned officers. 32 C.F.R. § 9.4(a)(2), (3). The commission before which Hamdan is to be tried consists of three colonels. Brief for Appellants at 7. We therefore see no reason why Hamdan could not assert his claim to prisoner of war status before the military commission at the time of his trial and thereby receive the judgment of **[*30]** a "competent tribunal" within the meaning of Army Regulation 190-8.

* * *

For the reasons stated above, the judgment of the district court is reversed.

So ordered.

CONCURBY: WILLIAMS

CONCUR: WILLIAMS, *Senior Circuit Judge*, concurring: I concur in all aspects of the court's opinion except for the conclusion that Common Article 3 does not apply to the United States's conduct toward al Qaeda personnel captured in the conflict in Afghanistan. Maj. Op. 15-16. Because I agree that the Geneva Convention is not enforceable in courts of the United States, and that that any claims under Common Article 3 should be deferred until proceedings against Hamdan are finished, I fully agree with the court's judgment.

* * *

There is, I believe, a fundamental logic to the Convention's provisions on its application. Article 2 (P1) covers armed conflicts between two or more contracting parties. Article 2 (P3) makes clear that in a multi-party conflict, where any two or more signatories are on opposite sides, those parties "are bound by [the Convention] in their mutual relations"--but not (by implication) vis-a-vis any non-signatory. And as the court points out, Maj. Op. at 14, under Article 2 (P3) **[*31]** even a non-signatory "Power" is entitled to the benefits of the Convention, as against a signatory adversary, if it "accepts and applies" its provisions.

Non-state actors cannot sign an international treaty. Nor is such an actor even a "Power" that would be eligible under Article 2 (P3) to secure protection by complying with the Convention's requirements. Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The gap being filled is the non-eligible party's failure to be a nation. Thus the words "not of an international character" are sensibly understood to refer to a conflict between a signatory nation and a non-state actor. The most obvious form of such a conflict is a civil war. But given the Convention's structure, the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict "not of an international character." In such a conflict, **[*32]** the signatory is bound to Common Article 3's modest requirements of "humane[]" treatment and "the judicial guarantees which are recognized as indispensable by civilized peoples."

I assume that our conflicts with the Taliban and al Qaeda are distinct, and I agree with the court that in reading the Convention we owe the President's construction "great weight." Maj. Op. at 15. But I believe the Convention's language and structure compel the view that Common Article 3 covers the conflict with al Qaeda.

REVIEW EXHIBIT 148

PAGES 25-30

Review Exhibit (RE) 148 (pages 25-30), is a memorandum signed by the Chief, Army Standards of Conduct Office (SOCO), Office of The Judge Advocate General, located in Arlington, Virginia. It is addressed to the Presiding Officer, *United States v. al Bahlul*.

RE 148 (pages 25-30) responds to the Presiding Officer's question concerning whether an Army Judge Advocate can be lawfully ordered to represent an Accused who is being tried by military commission when that same Accused declines that representation.

This same document was previous admitted as RE 129. RE 148 (pages 25-30) consists of 6 pages.

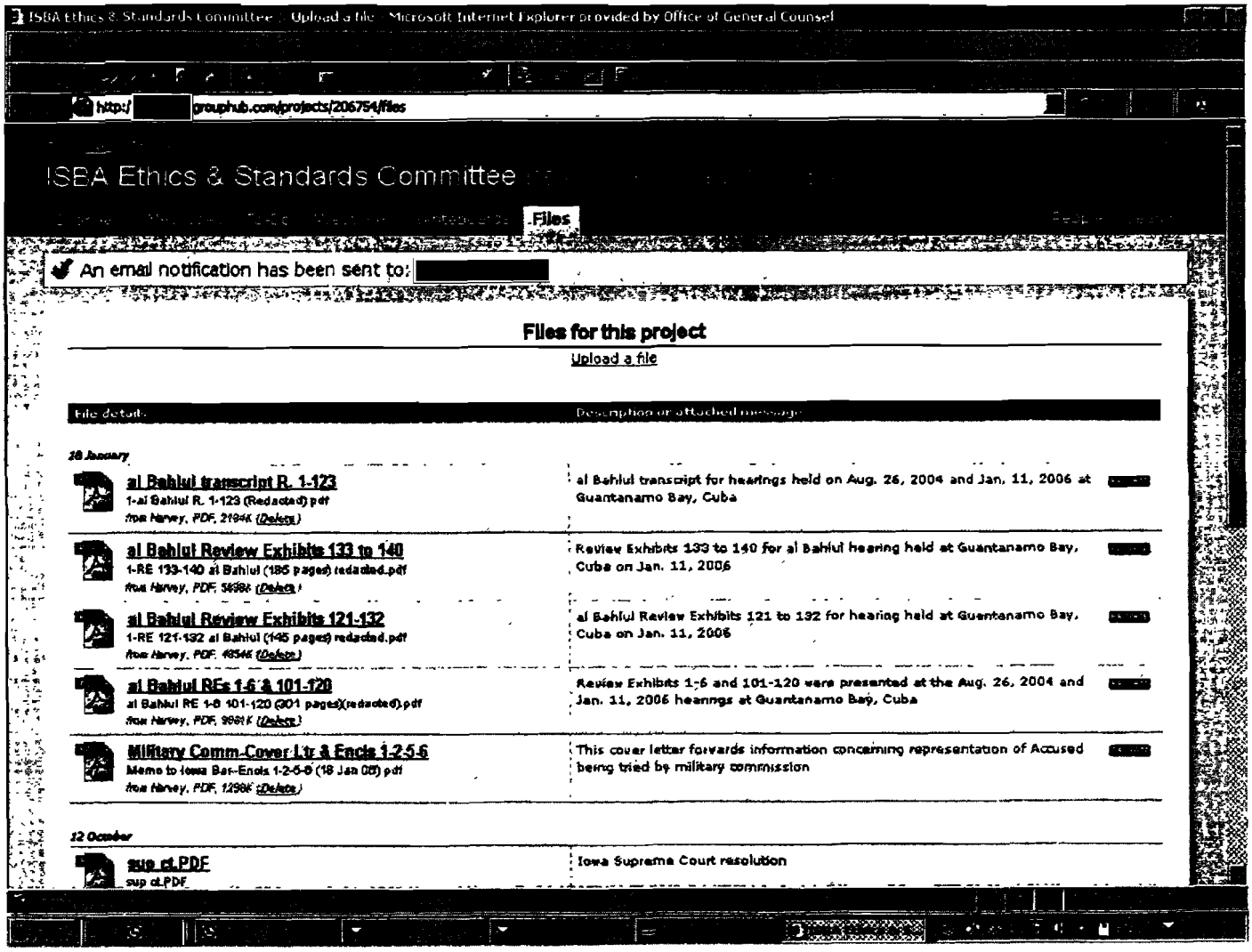
SOCO has requested that RE 129 not be released on the Department of Defense Public Affairs web site, and that any requests for RE 129 be referred to SOCO.

RE 129 and RE 148 without redactions were released to the parties in *United States v. al Bahlul*, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 129 and RE 148 (pages 25-30).

//signed//

M. Harvey
Chief Clerk for
Military Commissions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28 January
al Bahlul transcript R. 1-123
1-al Bahlul R. 1-123 (Redacted).pdf
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al Bahlul transcript for hearings held on Aug. 26, 2004 and Jan. 11, 2006 at Guantanamo Bay, Cuba
al Bahlul Review Exhibits 133 to 140
1-RE 133-140 al Bahlul (185 pages) redacted.pdf
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Review Exhibits 133 to 140 for al Bahlul hearing held at Guantanamo Bay, Cuba on Jan. 11, 2006
al Bahlul Review Exhibits 121-132
1-RE 121-132 al Bahlul (145 pages) redacted.pdf
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al Bahlul Review Exhibits 121 to 132 for hearing held at Guantanamo Bay, Cuba on Jan. 11, 2006
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al Bahlul RE 1-6 101-120 (301 pages)(redacted).pdf
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Review Exhibits 1-6 and 101-120 were presented at the Aug. 26, 2004 and Jan. 11, 2006 hearings at Guantanamo Bay, Cuba
Military Comm-Cover Ltr & Encls 1-2-5-6
Memo to Iowa Bar-Encls 1-2-5-6 (18 Jan 08).pdf
from Harvey, PDF, 129kK (Delete)
This cover letter forwards information concerning representation of Accused being tried by military commission
12 October
sup ct.PDF
sup ct.PDF
Iowa Supreme Court resolution

Harvey, [redacted] Mr, DoD OGC

From: Harvey, [redacted] Mr, DoD OGC
Sent: Friday, January 20, 2006 10:16
To: [redacted]
Cc: [redacted]

Subject: al Bahlul Materials to the Iowa State Bar Association

Mr. [redacted]

You asked me to email to you the regulatory source for the conspiracy charge. It is Mililitary Commission Instruction (MCI) No. 2, para. 6A(6), at pages 19-21.

The defense counsel in other military commission cases have challenged the legality of conspiracy as an offense under the laws of war. I can email you the briefs of the parties on this issue, if you like. The briefs I refer to are publicly available on the Military Commissions website, but are a little challenging to locate.

I will also email in a few minutes the MCI pertaining to sentencing.

Respectfully,

M. Harvey
Chief Clerk of Military Commissions

Harvey, [redacted] Mr, DoD OGC

From: Harvey, [redacted] Mr, DoD OGC
Sent: Friday, January 20, 2006 10:16
To: [redacted]
Cc: Sullivan, Dwight, COL, DoD OGC
Subject: Al Bahlul - Communication to Iowa State Bar

Mr. [redacted]

You asked me to email to you the regulatory source for the conspiracy charge. It is Milititary Commission Instruction (MCI) No. 2, para. 6A(6), at pages 19-21.

Mil Comm Inst No. 2--Crimes & ...

The defense counsel in other military commission cases have challenged the legality of conspiracy as an offense under the laws of war. I can email you the briefs of the parties on this issue, if you like. The briefs I refer to are publicly available on the Military Commissions website, but are a little challenging to locate.

I will also email in a few minutes the MCI pertaining to sentencing.

Please let me know if I can be of any further assistance.

Respectfully,

M. Harvey
Chief Clerk of Military Commissions

Harvey, [redacted] Mr, DoD OGC

From: Harvey, [redacted] Mr, DoD OGC
Sent: Friday, January 20, 2006 10:24
To: [redacted]
Cc: [redacted]
Subject: al Bahlul Materials to the Iowa State Bar Association--MCI No. 7

Mr. [redacted]

You asked me to provide the maximum sentence to confinement faced by Mr. al Bahlul under military commission law.

Mr. al Bahlul faces a maximum sentence of confinement for life. His case was referred non-capital. Military Commission Instruction No. 7 (30 Apr 2003) is attached. It further explains the military commission sentencing process.

M. Harvey
Chief Clerk of Military Commissions

-----Original Message-----
From: Harvey, [redacted] Mr, DoD OGC
Sent: Friday, January 20, 2006 10:16
To: [redacted]
Cc: [redacted]
Subject: al Bahlul Materials to the Iowa State Bar Association

Mr. [redacted]

You asked me to email to you the regulatory source for the conspiracy charge. It is Mililitary Commission Instruction (MCI) No. 2, para. 6A(6), at pages 19-21.

The defense counsel in other military commission cases have challenged the legality of conspiracy as an offense under the laws of war. I can email you the briefs of the parties on this issue, if you like. The briefs I refer to are publicly available on the Military Commissions website, but are a little challenging to locate.

I will also email in a few minutes the MCI pertaining to sentencing.

Respectfully,

M. Harvey
Chief Clerk of Military Commissions

RE 148 (al Bahlul)
Page 34 of 34

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Tuesday, January 24, 2006 12:27 PM
To: [redacted]
Subject: PO 103 D - Trial Schedule - US v al Bahlul
Attachments: PO 101 D - al Bahlul - DC response to PO 101 and PO 101 B, 19 Dec.pdf; Calendar.pdf; PO 101 C - al Bahlul - Prosecution response to para 7c, PO 101 w attachment, 12 Dec.pdf

All Counsel in US v. al Bahlul

1. The Presiding Officer has reviewed the attachments and the relevant portion of the draft session transcript of 11 January which was previously served on counsel by the Chief Clerk.

2. Motions concerning the Discovery Order are due in accordance with paragraph 7, PO 104 sent 23 January. (Convenience copy attached.) Other law motions are due on 22 February 2006. (A "law motion" is any motion except that to suppress evidence or address another evidentiary matter.)

3. Evidentiary motions will be due on 29 March 2006.

4. All counsel in US v. al Bahlul will be prepared to go to Guantanamo for the February trial term. If a session in Al Bahlul is held during that trial term, it will focus on voir dire, discovery, and motions practice. The Presiding Officer will not make a decision on the need for such a session until the middle of February 2006.

5. Counsel will review the attachments, the draft session transcript of the 11 January session, and the contents of this email and determine when each side believes the motions session on law motions should be held. If counsel can not agree by 24 February 2006, the Presiding Officer will set a date.

BY DIRECTION OF THE PRESIDING OFFICER
Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

<<PO 101 D - al Bahlul - DC response to PO 101 and PO 101 B, 19 Dec.pdf>> <<Calendar.pdf>> <<PO 101 C - al Bahlul - Prosecution response to para 7c, PO 101 w attachment, 12 Dec.pdf>>

RE 149 (al Bahlul)
Page 1 of 12

Hodges, Keith

From: [redacted]
Sent: Tuesday, December 13, 2005 1:13 PM
To: [redacted]
Subject: PO 101 (al Bahlul) - Prosecution Response to Presiding Officer's Resumption of Proceedings Order
Attachments: Prosecution Response - PO 101 110.pdf

Sirs -

Attached please find the Prosecution's proposed litigation schedule in response to paragraph 7c of the Presiding Officer's Resumption of Proceedings order of 16 NOV 05.

<<Prosecution Response - PO 101 110.pdf>>

[redacted]
Prosecutor, Office of Military Commissions,
Department of Defense
[redacted]

UNITED STATES OF AMERICA v. ALI HAMZA SULAYMAN AL BAHLUL	**PO 101 – al Bahlul** **Prosecution Response to Presiding Officer's Resumption of Proceedings Order** **December 13, 2005**

1. Pursuant to paragraph 7c of the Resumption of Proceedings Order, 16 November 2005, the Presiding Officer directed counsel for both sides in the above captioned case to propose a trial schedule.

a. The Prosecution proposes the following trial schedule:

(1) 10 January 2006: First session to determine counsel rights, voir dire the Presiding Officer, and set a litigation schedule. [7c(1)]

(2) 30 January 2006: Motions not dependent on opposing party's compliance with discovery. [7c(2)]

(3) 13 February 2006: Responses to motions.

(4) 27 February 2006: Discovery obligations completed (subject to continuing obligations with regard to discovery). [7c(3)]

(5) 28 February 2006: Voir dire prospective members; litigate motions requiring hearing before Presiding Officer. [7c(4)]

(6) 11 April 2006: Commence presentation of evidence on the merits. [7c(5)]

2. The point of contact for this response is the undersigned.

[redacted]
Lt Col, USAFR
Prosecutor

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

19 December 2005

TO: Colonel Peter Brownback, Presiding Officer
SUBJECT: Required Response to Presiding Officer's 12/16/05 email - United States v. al Bahul

1. Pursuant to paragraph 7b of the Resumption of Proceedings Order, 16 November 2005, the Presiding Officer directed counsel for both sides in the above captioned case to provide a calendar showing the dates in which they are unavailable to attend a session or work on Commission matter. I am filing this memorandum, not as Mr. al Bahul's counsel, rather under the condition that I am ordered to represent him and if that order is lawful therefore forcing my representation upon him.

2. I am currently scheduled to attend the Law of War course in Charlottesville, VA during the last week of January.

3. Notwithstanding paragraph 7(d), I prepared this document in memorandum form so as to avoid any appearance of serving as Mr. al Bahul's counsel.

4. I am the point of contact. I can be reached at [redacted]

Tom Fleener
MAJ, JA
Defense Counsel

Copy to:
LtCol [redacted]
Mr. Keith Hodges

Hodges, Keith

From: Fleener, Tom, MAJ DoD GC [redacted]
Sent: Monday, December 19, 2005 12:36 PM
To: [redacted]
Subject: PO 101 (al Bahlul) - calendar (Fleener)
Attachments: Calendar.pdf

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Friday, December 16, 2005 23:28
To: [redacted]
Hodges, Keith
Subject: Presiding Officer's Reply: RE: PO 101 (al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

MAJ Fleener,

Please see COL Brownback's instructions to me below.

Keith Hodges

Mr. Hodges,

Please send the below to MAJ Fleener, all counsel in US v. Al Bahlul, the Chief Defense Counsel, and the Chief Prosecutor.

Please make MAJ Fleener's email and the attached memo a filing in the PO 101 series. Please make LTC [redacted] email and the attached memo a separate filing in the PO 101 series.

COL Brownback

MAJ Fleener

1. Your request in paragraph 7 of your 16 December 2005 memorandum is granted. See the instructions above to Mr. Hodges.

2. Regardless of your position on whether you will be representing Mr. al Bahlul, it does not change the fact that you were directed to provide your calendar showing your availability and you were directed to suggest a trial calendar. This information does not require you to assert any position with regard to Mr. al Bahlul, but only for you to provide the Presiding Officer with information to be used to plan Commission proceedings, should you be

directed to represent Mr. al Bahlul.

3. So there is no question in your mind, I refer you to COL Sullivan's memorandum of 3 November 2005 in which he detailed you as Military Counsel for Mr. al Bahlul. The case of the United States v. al Bahlul was referred to a military commission for trial. I was appointed as the Presiding Officer of that military commission. I am a full colonel on active duty in the United States Army. I have determined that fulfilling the requirements I laid out for you in my basic correspondence and in paragraph 2 above are related to your military duty as Military Counsel for Mr. al Bahlul.

3. Your request in paragraph 3 of your attachment to have me translate certain matters into Arabic is denied. The Chief Defense Counsel, COL Sullivan, will be able to direct you on how you can get documents translated for the client whom he has detailed you to represent.

4. You will be prepared to conduct voir dire of the Presiding Officer during the January 2006 trial term. One of the outcomes of that session is that you could be ordered to represent Mr. al Bahlul, and if that is the case, you will either conduct voir dire or waive your opportunity to do so.

5. You are hereby ordered to comply with paragraph 7c, PO 101, no later than 1200 hours, 19 December 2005.

Peter E. Brownback III
COL, JA
Presiding Officer

Per the Presiding Officer's direction, this email, MAJ Fleener's email below, and the attachment to MAJ Fleener's email will be added to the filings inventory as PO 101 B. LTC [redacted] email and the attachment to his email wherein he responded to paragraph 7c of PO 101 will be added to the filings inventory as PO 101 C.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Fleener, Tom, MAJ DoD GC [redacted]
Sent: Friday, December 16, 2005 5:08 PM
To: [redacted]
Subject: PO 101 (al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

<<Memo to PO .pdf>>

-----Original Message-----

From: [redacted] DoD OGC

Sent: Tuesday, December 13, 2005 13:13

To: [redacted]

Subject: PO 101 (al Bahlul) - Prosecution Response to Presiding Officer's Resumption of Proceedings Order

Sirs -

Attached please find the Prosecution's proposed litigation schedule in response to paragraph 7c of the Presiding Officer's Resumption of Proceedings order of 16 NOV 05.

<< File: Prosecution Response - PO 101 110.pdf >>

[redacted]
Prosecutor, Office of Military Commissions,
Department of Defense
[redacted]

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

19 December 2005

TO: Colonel Peter Brownback, Presiding Officer
SUBJECT: Required Response to Presiding Officer's 12/16/05 email - United States v. al Bahul

1. Pursuant to paragraph 7b of the Resumption of Proceedings Order, 16 November 2005, the Presiding Officer directed counsel for both sides in the above captioned case to provide a calendar showing the dates in which they are unavailable to attend a session or work on Commission matter. I am filing this memorandum, not as Mr. al Bahul's counsel, rather under the condition that I am ordered to represent him and if that order is lawful therefore forcing my representation upon him.

2. I am currently scheduled to attend the Law of War course in Charlottesville, VA during the last week of January.

3. Notwithstanding paragraph 7(d), I prepared this document in memorandum form so as to avoid any appearance of serving as Mr. al Bahul's counsel.

4. I am the point of contact. I can be reached at [redacted]

Tom Fleener
MAJ, JA
Defense Counsel

Copy to:
LtCol [redacted]
Mr. Keith Hodges

Hodges, Keith

From: Fleener, Tom, MAJ DoD GC [redacted]
Sent: Monday, December 19, 2005 12:38 PM
To: [redacted]
Subject: PO 101 (al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order
Attachments: PO 101-Defense Response to Presiding Officer's Resumption of Proceedings Order.pdf

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Friday, December 16, 2005 23:28
To: Rob [redacted]
Subject: Presiding Officer's Reply: RE: PO 101 (al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

MAJ Fleener,

Please see COL Brownback's instructions to me below.

Keith Hodges

Mr. Hodges,

Please send the below to MAJ Fleener, all counsel in US v. Al Bahlul, the Chief Defense Counsel, and the Chief Prosecutor.

Please make MAJ Fleener's email and the attached memo a filing in the PO 101 series. Please make LTC [redacted] email and the attached memo a separate filing in the PO 101 series.

COL Brownback

MAJ Fleener

1. Your request in paragraph 7 of your 16 December 2005 memorandum is granted. See the instructions above to Mr. Hodges.

2. Regardless of your position on whether you will be representing Mr. al Bahlul, it does not change the fact that you were directed to provide your calendar showing your availability and you were directed to suggest a trial calendar. This information does not require you to assert any position with regard to Mr. al Bahlul, but only for you to provide the Presiding Officer

with information to be used to plan Commission proceedings, should you be directed to represent Mr. al Bahlul.

3. So there is no question in your mind, I refer you to COL Sullivan's memorandum of 3 November 2005 in which he detailed you as Military Counsel for Mr. al Bahlul. The case of the United States v. al Bahlul was referred to a military commission for trial. I was appointed as the Presiding Officer of that military commission. I am a full colonel on active duty in the United States Army. I have determined that fulfilling the requirements I laid out for you in my basic correspondence and in paragraph 2 above are related to your military duty as Military Counsel for Mr. al Bahlul.

3. Your request in paragraph 3 of your attachment to have me translate certain matters into Arabic is denied. The Chief Defense Counsel, COL Sullivan, will be able to direct you on how you can get documents translated for the client whom he has detailed you to represent.

4. You will be prepared to conduct voir dire of the Presiding Officer during the January 2006 trial term. One of the outcomes of that session is that you could be ordered to represent Mr. al Bahlul, and if that is the case, you will either conduct voir dire or waive your opportunity to do so.

5. You are hereby ordered to comply with paragraph 7c, PO 101, no later than 1200 hours, 19 December 2005.

Peter E. Brownback III
COL, JA
Presiding Officer

Per the Presiding Officer's direction, this email, MAJ Fleener's email below, and the attachment to MAJ Fleener's email will be added to the filings inventory as PO 101 B. LTC [redacted] email and the attachment to his email wherein he responded to paragraph 7c of PO 101 will be added to the filings inventory as PO 101 C.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Fleener, Tom, MAJ DoD GC [redacted]
Sent: Friday, December 16, 2005 5:08 PM
To: [redacted]
Subject: PO 101 (al Bahlul) - Defense Response to Presiding Officer's Resumption of Proceedings Order

<<Memo to PO .pdf>>

-----Original Message-----
From: [redacted] LTCOL, DoD OGC
Sent: Tuesday, December 13, 2005 13:13
To: [redacted]

Subject: PO 101 (al Bahlul) - Prosecution Response to Presiding Officer's Resumption of Proceedings Order

Sirs -

Attached please find the Prosecution's proposed litigation schedule in response to paragraph 7c of the Presiding Officer's Resumption of Proceedings order of 16 NOV 05.

<< File: Prosecution Response - PO 101 110.pdf >>

[redacted]
Prosecutor, Office of Military Commissions,
Department of Defense
[redacted]

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

19 December 2005

TO: Colonel Peter Brownback, Presiding Officer
SUBJECT: Required Response to Presiding Officer's 12/16/05 email - United States v. al Bahul

1. Pursuant to paragraph 7c of the Resumption of Proceedings Order, 16 November 2005, the Presiding Officer directed counsel for both sides in the above captioned case to propose a trial schedule. I am filing this memorandum, not as Mr. al Bahul's counsel, rather under the condition that if I am ordered to represent him and if that order is lawful therefore forcing my representation upon him, the dates below would be the earliest possible dates I could be prepared.

a. Answer to 7(c)(1). This appears to be moot as a date has already been set for the first session.

b. Answer to 7(c)(2). 1 April 2006

c. Answer to 7(c)(3). Prosecution only

d. Answer to 7(c)(4). 1 May 2006

e. Answer to 7(c)(5). 1 September 2006

2. Notwithstanding paragraph 7(d), I prepared this document in memorandum form so as to avoid any appearance of serving as Mr. al Bahul's counsel.

3. I am the point of contact. I can be reached at [redacted]

Tom Fleener
MAJ, JA
Defense Counsel

Copy to:
LtCol [redacted]
Mr. Keith Hodges

UNITED STATES OF AMERICA	)	**DISCOVERY ORDER (PO 104)**
v.	)	**23 January 2006**
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	

1. The Presiding Officer finds that to ensure a full and fair trial, the following ORDER is necessary. All correspondence to the Presiding Officer concerning this Discovery Order shall reference the filings designation, PO 104. (See POM 12-1 concerning filings designations.)

2. This Order does not relieve any party of any duty to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times earlier or later than Commission Law provides or requires, the Presiding Officer has determined that such earlier or later disclosure is necessary for a full and fair trial.

3. All disclosures required by this Order are continuing in nature. The times set forth below apply to any matter known to exist, or reasonably believed to exist, on the date this Order is issued. If any matter required to be disclosed by this order is not known to exist on the date this Order is issued, but later becomes known, the party with the responsibility to disclose it under this Order will disclose it as soon as practicable, but not later than three duty days from learning that the matter exists. In those cases when any matter required to be disclosed by this Order, becomes known after the date of this Order, but the party is unable to obtain or produce it as required, the party shall give written (email) notice to opposing counsel within three duty days, said notice including a description of the nature of the item or matter and the date and time when it will be produced or disclosed.

4. Any matter that has been provided or disclosed to opposing counsel prior to the entry of this Order need not be provided again if only to comply with this Order.

5. Providing a list of witness names in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10-2.

6. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced or disclosed by this Order. If counsel believe there has not been adequate compliance with this Order, counsel shall seek relief using the procedures in POM 4-3 or POM 7-1, as appropriate.

7. Objections to the wording of this Order, or the authority to issue this Order. Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 10 FEB 2006. If a motion is made, the response thereto shall be filed within 7 days of receiving the motion. If a reply is desired, it shall me made within 5 days after the response is received. If either party makes a motion concerning this Order, the parties will continue to fulfill discovery obligations pending disposition of the motion, unless the motion also requests, and the Presiding Officer grants, a delay from compliance. Any request for a delay will particularly describe the items by paragraph number as listed in this Order for which a delay is requested. A request for a delay that accompanies a motion concerning this Order for items not affected by the motion will not ordinarily be granted.

8. Failure to disclose a matter as required by this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary to enforce this Order or to otherwise ensure a full and fair trial.

9. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

10. Each of the disclosure requirements of this Order shall be interpreted as a requirement to provide to opposing counsel a duplicate of the original of any matter to be disclosed. Transmittal of a matter to opposing counsel electronically satisfies the disclosure requirements herein and is the preferred method of production. When disclosure of any matter is impracticable or prohibited because of the nature of the item (a physical object, for example), or because it is protected or classified, the disclosing party shall permit the opposing counsel to inspect the item in lieu of providing it.

11. A party has not complied with this Order until that party has disclosed to detailed counsel for the opposing party - or another counsel lawfully designated by the detailed counsel - the matter required to be disclosed or provided.

12. Definitions:

a. "At trial." As used in this order, the term "at trial" means during the proponent party's case in chief (and not rebuttal or redirect), whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

b. "Exculpatory evidence" includes any evidence that tends to negate the guilt of the accused, or mitigates any offense with which the accused is charged, or is favorable and material to either guilt or to punishment.

c. "Synopsis of a witness' testimony" is that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify. A synopsis shall be prepared as though the witness were speaking (first person), and shall be sufficiently detailed as to demonstrates both the testimony's relevance and that the witness has personal knowledge of the matter offered. *See* Enclosure 1, POM 10-2, for some suggestions.

d. "Disclosure" as used in this Order is synonymous with "production."

e. "Matter" includes any matters whatsoever that is required to be produced under the terms of this Order, whether tangible or intangible, including but not limited to, physical objects, documents, audio, video or other recordings in any media, electronic data, studies, reports, or transcripts of testimony, whether from depositions, former commission hearings, or other sworn testimony.

13. Nothing in this Order shall be interpreted to require the disclosure of attorney work product to include notes, memoranda, or similar working papers prepared by counsel or counsel's trial assistants.

14. The Prosecution shall provide to the Defense the items listed below not later than 13 Feb 2006 The items shall be provided to the detailed defense counsel unless the detailed defense counsel designates another lawful recipient of the items. The Prosecution may request a delay in compliance with this Order by either requesting a delay from the Presiding Officer as part of a motion made in accordance with paragraph 7 above. The Prosecution may also request a delay in compliance with this Order, citing the reasons therefore, before the time for compliance has arrived if they do not wish to file a motion but only need more time for compliance.

a. Evidence and copies of all information the prosecution intends to offer at trial.

b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Exculpatory evidence known to the prosecution.

e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

(1.) The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

(2.) Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.

(3.) Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.

f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

15. The Defense shall provide to the Prosecution the items listed below not later than 6 March 2006. The items shall be provided to the detailed prosecutor unless the detailed prosecutor designates another lawful recipient of the items. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness. The Defense may request a delay in compliance with this Order by either requesting a delay from the Presiding Officer as part of a motion made in accordance with paragraph 7 above. The Defense may also request a delay in compliance with this Order, citing the reasons therefore, before the time for compliance has arrived if they do not wish to file a motion but only need more time for compliance.

a. Evidence and copies of all matters the defense intends to offer at trial.

b. The names and contact information of all witnesses the defense intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

e. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any offense or any element of any offense.

f. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

g. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

16. When Alternatives to Live Testimony Will Be Offered by a Party.

a. The testimony of a witness may be offered by calling the person to appear as a witness before the Commission (live testimony) or by using alternatives to live testimony.

b. Whenever this Order requires a party to disclose the names of witnesses to be called, a party which intends to offer an alternative to live testimony shall provide the notice below to the opposing party:

(1.) Intent to use alternatives to live testimony rather than calling the witness.

(2.) The method of presenting the alternative to live testimony the party intends to use. (*See* paragraph 3c(6)(a-g), POM 10-2, for examples),

(3.) The dates, locations, and circumstances - and the persons present - when the alternative was created, and

(4.) The reason(s) why the alternative will be sought to be used rather than production of live testimony.

17. Objections to Alternatives to Live Testimony.

If, after receiving a notice required by paragraph 16 above, the party receiving the notice wishes to prevent opposing counsel from using the proposed alternative to live testimony, the receiving party shall file a motion under the provisions of POM# 4-3. Such motion shall be filed within 5 days of disclosure of the intent to offer an alternative to live testimony, or the receiving party shall be deemed to have waived any objection to the use of an alternative to live testimony.

18. Obtaining or Creating Alternatives to Live Testimony - Notice and Opportunity to Attend and Participate.

a. Under Commission Law, confrontation of persons offering information to be considered by the Commission is not mandatory, nor is there a requirement for both parties to participate in obtaining or creating alternatives to live testimony. Further, there is no general rule against hearsay.

b. As a result, parties must afford opposing counsel sufficient notice and opportunity to attend witness interviews when such interviews are intended to preserve testimony for actual presentation to the Presiding Officer or other members of the Commission.

c. Failure to provide such notice as is practical may be considered - at the discretion of the Presiding Officer (or in a paragraph 6D(1), MCO# 1 determination , by the other Commission members) - along with other factors, on the issue of admissibility of the proffered testimony.

IT IS SO ORDERED:

/s/
Peter E. Brownback, III
COL, JA, USA
Presiding Officer

DEPARTMENT OF DEFENSE
OFFICE OF THE APPOINTING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CHIEF CLERK FOR
MILITARY COMMISSIONS

January 12, 2005

MEMORANDUM THRU Assistant to the Presiding Officer 12 Jan 2005

FOR Prosecutor, *United States v. al Bahlul*
Detailed Defense Counsel, *United States v. al Bahlul*

SUBJECT: Review of Record of Trial by the Parties

Pursuant to the Appointing Authority Memorandum (June 30, 2005) (Encl 1) and Presiding Officer Memorandum (POM) 13-1 (Sept. 26, 2005) (Encl 2), the Prosecution and Defense are hereby served with a copy of the draft session transcript (Encl 3) for the following session:

- **Jan. 11, 2006 session, *United States v. al Bahlul***

POM 13-1, para. 4b provides, "Within 15 days of service of a draft session where a Commission translator was used, the lead counsel for both sides (or a counsel designated by the lead counsel) shall provide an errata sheet in electronic form to the Presiding Officer and the Assistant indicating by page and line number and using the errata sheet at enclosure 4." This same paragraph then further describes other duties of the parties.

The presiding officer has reviewed the "draft session transcript" at enclosure 1, and it is now ready for the review of counsel for comment or correction under POM 13-1, para. 2e(1).

If the presiding officer does not receive a response in fifteen calendar days, objection to errors in the transcript is waived, unless the responsible counsel requests and receives an extension from the presiding officer. *See* POM 13-1, para. 4C. Therefore, it is important to carefully review the enclosed transcript and provide any comments in a timely fashion.

A copy of this memorandum, and any response received from the parties will be filed in the allied papers in the Clerk of Military Commissions section of the allied papers.

//Signed//

M. Harvey
Chief Clerk of
Military Commissions

3 Enclosures
1. POM 13-1 (Sept. 26, 2005)
2. Appointing Authority Memorandum (June 30, 2005)
3. Transcript pages 19-123

UNITED STATES OF AMERICA	)	**PO 102 N**
v.	)	**Findings of Fact, Conclusions of Law, and Rulings With Respect to the Accused's Request to Be Allowed to Proceed *Pro Se***
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	**27 January 2006**

1. References:

a. In making the findings in paragraph 2 below, the commission considered its in-court observations of Mr. Al Bahlul on 26 August 2004 and on 11 January 2006. The commission also considered the transcripts of both sessions and RE 135.

b. In making the legal conclusions on the second independent, severable, and distinct basis for my ruling, the commission considered the President's Military Order of 13 November 2001, Military Commission Order # 1 dated 31 August 2005, and Military Commission Instruction #4 dated 16 September 2005. The commission also considered the matters contained in PO Filing 102 and PO Filings A-J (RE 101, 113-119, and 128-130.)

c. On 13 January 2006, the commission invited counsel for both sides to present a proposed ruling on this issue (Attachment 1) and gave them until 25 January 2006 to do so. The prosecution furnished a proposed ruling on 24 January 2006 (Attachments 2 and 3). The defense did not submit a proposed ruling.

2. Findings of Fact: Mr. Al Bahlul:

a. is approximately 38 years old and has sixteen years of formal education. No finding is made concerning the background, type, or nature of this education.

b. has some amount of knowledge about American culture and customs.

c. is not completely fluent in English and requires translation assistance.

d. has no formal education in the law, although he has read some matters and books concerning international law.

e. has been, most of the time, outwardly respectful towards the commission.

f. has refused to stand when the commission entered and departed.

g. has refused to answer questions and has departed on tangents of his own when questioned on specific matters.

h. has demonstrated a tendency, and appears to have the desire to make speeches rather than address the matters before the commission. (Eg., pp. 10-11, 26 Aug 04 transcript.)

i. does not have any background in or specific knowledge of military criminal law.

j. in the January 2006 session, stated that all Americans are his enemies.

k. in the January 2006 session, stated in court that he is boycotting the proceedings and has held up a sign (RE 135) to show the spectators that he is boycotting the proceedings. Once he finished stating his "9 points," he removed his headphones that allowed him to hear the Arabic translation, laid them down, and held up the "boycott" sign. After that point, Mr. al Bahlul never participated in the remainder of the session, despite the Presiding Officer requesting that he delay his boycott until other matters were handled.

l. in the January 2006 session, stated in court that he will not respect US laws and the procedures of the military commissions.

m. did not wait until the Presiding Officer made a ruling on his request to go *pro se* before stating that he would boycott the court though he earlier indicated that he knew the Presiding Officer had not yet made a decision, and that making and announcing the decision was one of the purposes of the session.

3. Conclusions of Law:

a. Based on the factual findings in paragraph 2 above, the commission concludes that Mr. Al Bahlul:

(1) does not have the necessary background and training to represent himself before the commission.

(2) does not have the language skills necessary to represent himself before the commission.

(3) would not comply with the directions of the commission.

(4) would not focus his attention on the commission proceedings.

(5) would attempt to prevent the commission from providing a full and fair trial.

The commission therefore concludes that Mr. Al Bahlul is not competent to represent himself before the commission, even if the law allowed him to represent himself.

b. Based on the provisions of Section 4c(4) of the President's Military Order, Paragraph 4c of Military Commission Order #1, and Paragraph 3d of Military Commission Instruction #4, the

commission concludes that, under the provisions establishing the military commissions, an accused may not represent himself. The reasons therefore are within the discretion of the President and his delegee; some of these reasons are expressed in the Appointing Authority's Memorandum of 14 June 2005 (Encl 20 to RE 101) in which he ruled that Mr. Al Bahlul could not proceed *pro se*. The commission finds that those rules are reasonable and not inherently outside the scope of the President's authority and that they are consistent with providing a full and fair trial. The commission has not been presented with, nor has it found in its own research, any argument or citations or legal authority which convinces the commission that the 6th Amendment to the United States Constitution applies to the Military Commission proceedings, insofar as a right to proceed *pro se* might exist. The commission therefore concludes that Mr. Al Bahlul is not allowed to represent himself before the commission, even if he were competent to do so.

4. **Ruling**: Mr. Al Bahlul's request to proceed *pro se* is denied.

Peter E. Brownback III
COL, JA
Presiding Officer

Attachment 1

From: "Hodges, Keith" [redacted]
To: [redacted]
Subject: FW: Draft Pro Se Order - Counsel Drafts
Date: Friday, January 13, 2006 1:36 PM

Counsel in US v. al Bahlul,

Your attention is invited to the below email from the Presiding Officer. This email and the below email will be added to the filings inventory.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[redacted]

> -----Original Message-----
> From: Brownback, Peter E. COL OMC_Presiding Officer (L)
> Sent: Friday, January 13, 2006 11:27 AM
> To: Hodges, Keith H. CTR (L)
> Cc: [redacted]
> Subject: Draft Pro Se Order - Counsel Drafts
>
>
> Mr. Hodges,
>
> Please forward the below to counsel at their home station email addresses.
>
> COL Brownback
>
>
>
>
> To Counsel in the case of United States v. Al Bahlul,
>
> After I announced my pro se ruling on the record on 11 January 2005, I stated:
>
> "I will prepare a draft ruling and provide it to counsel for both sides and if they want to
> expand upon my rulings or suggest something else, they may."
>
> I am not going to provide a draft ruling to counsel. Counsel for either side may provide a proposed ruling to opposing counsel and Mr. Hodges. I will consider the proposed rulings, if any are received, before I issue my final written ruling. Any proposed ruling shall be confined to matters on the record (evidence, filings, and argument made before the Commission). Should counsel interject new matters, those matters will be disregarded.

>
> Such proposed ruling must be provided to Mr. Hodges and
> opposing counsel NLT 25 January 2006.
>
> COL Brownback
> Presiding Officer

Attachment 2

From: [redacted]
To: [redacted]
Subject: FW: Draft Pro Se Order - PROSECUTION
Date: Tuesday, January 24, 2006 2:26 PM

ALCON -

Attached please find the prosecution's proposed pro se ruling for the Presiding Officer's consideration.

V/R

Lt Col [redacted]

-----Original Message-----
From: Hodges, Keith H. CTR (L) [redacted]
Sent: Friday, January 13, 2006 12:33
To: [redacted]
Subject: RE: Draft Pro Se Order - Counsel Drafts

Counsel in US v. al Bahlul,

Your attention is invited to the below email from the Presiding Officer. This email and the below email will be added to the filings inventory.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[redacted]

> -----Original Message-----
> From: Brownback, Peter E. COL OMC_Presiding Officer (L)
> Sent: Friday, January 13, 2006 11:27 AM
> To: Hodges, Keith H. CTR (L)
> Cc: [redacted]
> Subject: Draft Pro Se Order - Counsel Drafts

>
>
>   Mr. Hodges,
>
>   Please forward the below to counsel at their home station email
> addresses.
>
>   COL Brownback
>
>
>
>
>   To Counsel in the case of United States v. Al Bahlul,
>
>   After I announced my pro se ruling on the record on 11 January

> 2005, I stated:
>
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> sides and if they want to
>   expand upon my rulings or suggest something else, they may."
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> for either side may provide a proposed ruling to opposing counsel and
> Mr. Hodges. I will consider the proposed rulings, if any are
> received, before I issue my final written ruling. Any proposed ruling
> shall be confined to matters on the record (evidence, filings, and
> argument made before the Commission). Should counsel interject new
> matters, those matters will be disregarded.
>
>   Such proposed ruling must be provided to Mr. Hodges and
> opposing counsel NLT 25 January 2006.
>
>   COL Brownback
>   Presiding Officer

Attachment 3

UNITED STATES OF AMERICA	)	
	)	**PROSECUTION**
v.	)	**PROPOSED PRO SE RULING**
	)	
ALI HAMZA SULAYMAN AL BAHLUL	)	**24 January 2006**

COMES NOW the Presiding Officer, after reviewing all matters of record in the above titled case, and makes the following Findings of Fact and Conclusions of Law with regard to the Accused's request for pro se representation:

FINDINGS OF FACT:

1. At the initial session of his Commission hearing on 26 August 2004, the Accused informed the members of the Commission that he wanted to represent himself before the Commission, or to be represented by a Yemeni attorney of his choice. (RE 101, pp. 10-26).

2. While discussing his desire to represent himself with the Presiding Officer, the Accused stated, "I am from al Qaida ...." (RE 101, p. 20).

3. Because Military Commission Order (MCO) No. 1 (21 March 2002), paragraph 4(c)(4) states the Accused "must be represented at all relevant times by Detailed Defense Counsel," and paragraph 4 (c)(3) requires any Civilian Counsel to be a United States citizen, the Presiding Officer directed the Detailed Defense Counsel, then LCDR Sundel, USN, and MAJ Bridges, USA, to brief the issues of whether the Accused enjoyed a right to self-representation before the Commission, and whether the Accused was entitled to be represented by an attorney that does not meet the security requirements set out in MCO No. 1. (RE 101, pp. 10-26).

4. The parties briefed the self-representation and security issues (RE 101, pp. 27-12). On 14 January 2005, the Appointing Authority denied the Accused's request to represent himself before the Commission. The Appointing Authority also refused to support a requested change to MCO No. 1 to allow such representation. (RE 101, pp. 113-14).

5. The Appointing Authority excused two of the three members of the Commission that attended the 26 August 2004 proceedings. The Appointing Authority did not excuse the Presiding Officer, who continues to serve in that capacity.

6. The Office of General Counsel, United States Department of Defense, updated MCO No. 1 on 31 August 2005. While the update changed the role of the Presiding Officer from a fact finder to a law officer, the update did not change the requirements that an Accused must be represented by a Detailed Defense Counsel and that any Civilian Counsel must be a United States citizen.

7. The Chief Defense Counsel, Col Dwight Sullivan, USMCR, detailed MAJ Thomas A. Fleener, USAR, as the Accused's Detailed Defense Counsel on 3 November 2005, replacing LCDR Sundel and MAJ Bridges. (RE 119).

8. At the 11 January 2006 Commission session, the Accused stated he understood that MAJ Fleener had been detailed to represent him, but that MAJ Fleener had been imposed upon him. (T 43-46).

9. The Accused stated that he refuses any military defense counsel imposed on him by our military law, and that he rejects any civilian lawyer, even if the civilian lawyer is a volunteer. (T 43-46).

10. When asked by the Presiding Officer whether he still wished to represent himself before the Commission, the Accused elected to make a statement of the causes and circumstances that justified the decision he was about to make, including:

a) An assertion that he is a prisoner of war and legal combatant based upon his religion and religious law, and he does not care what the Prosecutors call him based on our Earthly laws; (T 59).

b) and, that all members of the Commission are American, "So how can there be a tribunal, a court, a complete court, and a fair court as long as they do not – when they do not accept our rules, our laws. And we are not going to accept their rules and their laws." (T 59).

11. When the Presiding Officer sought to clarify whether the Accused still wished to represent himself before the Commission, the Accused responded that he would "boycott" any further Commission proceedings. (T 60).

CONCLUSIONS OF LAW:

12. The Accused announced he does not accept the Commission rules and laws and he will "boycott" all future proceedings of the Commission. Further, when the Accused has spoken on his own behalf, he has made statements that, but for the changes to the composition of the Commission, would have been to his own legal detriment. An Accused who refuses to participate in Commission proceedings, and who declares his intention not to follow the rules and laws of the Commission, is not competent to represent himself in that forum. The 26 August 2004 statement by the Accused to the effect that he is "from al Qaida," demonstrates that the Accused does not understand or appreciate his legal position, or how to protect his rights without legal representation.

13. MCO No. 1 and Military Commission Instruction No. 4 require that an Accused be represented by an appointed Detailed Defense Counsel at all times. The Appointing Authority has denied the Accused's request for self-representation or to support a change to MCO No. 1 to allow self-representation.

14. THERFORE, the Accused's request that he be allowed to represent himself before this Commission is denied. In accordance with the 3 November 2005 order of the Chief Defense Counsel, the Detailed Defense Counsel will continue to represent the Accused.

UNITED STATES v. SALIM AHMED HAMDAN – Case No. 04-0004	**Appointing Authority Decision on Challenges for Cause**
UNITED STATES v. DAVID MATTHEWS HICKS – Case No. 04-0001	Decision No. 2004-001
	October 19, 2004

Initial hearings were held in each of the above cases at Guantanamo Bay, Cuba, on August 24 and 25, 2004, respectively, during which voir dire was conducted.[1] In both cases, counsel for both sides reviewed detailed written questionnaires completed by each commission member, conducted voir dire of the commission as a whole, and then conducted extensive individual voir dire of the presiding officer, each of the four commission members, and the one alternate member.[2] Some of the commission members were also individually questioned by counsel in closed session so that classified matters could be examined.[3] In both the *Hamdan* and *Hicks* cases, defense counsel challenged the Presiding Officer, three of the four commission members, and the alternate commission member. During the hearings, the prosecution opposed all the challenges in both cases. However, in a subsequent brief filed by the Chief Prosecutor, the prosecution modified their position and no longer opposes the challenges for cause against Colonel (COL) B (a Marine),[4] Lieutenant Colonel (LTC) T, and LTC C.

[1] The initial hearing in *United States v. al Bahlul*, Case No. 04-0003, was held on August 26, 2004, at Guantanamo Bay, Cuba. The proceedings in that case were suspended prior to voir dire to resolve the accused's request to represent himself. The initial hearing in *United States v. al Qosi*, Case No. 04-0002, was held on August 27, 2004, at Guantanamo Bay, Cuba. Voir dire in that case is scheduled to be conducted in November 2004.

[2] By comparison, in the Nazi Saboteur Military Commission conducted during World War II, defense counsel asked only two questions of the commission as a whole and conducted no individual voir dire. There were no challenges for cause. *See* Transcript of Proceedings before the Military Commissions to Try Persons Charged with Offenses Against the Law of War and the Articles of War, Washington D.C., July 8-31, 1942, transcribed by the University of Minnesota, 2004, *available at* http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm at pp. 13-14.

[3] To what extent voir dire is conducted during any military commission is a matter within the discretion of the Presiding Officer. "The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate . . . [and shall ensure that] any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member." DoD Military Commission Instruction No. 8, "Administrative Procedures," paragraph 3A(2) (Aug. 31, 2004) [hereinafter MCI No. 8]. The Presiding Officer permitted extensive, wide-ranging voir dire in both of these cases. There was no objection by any counsel that the Presiding Officer impeded in any way their ability to conduct full and extensive voir dire of all the members, including the Presiding Officer.

[4] The final commission member, COL B (an Air Force officer), was not challenged by either side in either case. All further references to COL B herein refer to COL B, the Marine.

In each case, the Appointing Authority considered the trial transcript, the written briefs of the parties, the written questionnaires completed by the members, and the written recommendations of the Presiding Officer. While each case is decided on the record of trial in that case, this joint decision is provided because of the close similarities in the voir dire of the members and the arguments of counsel in both cases. Additionally, defense counsel from the *al Qosi* case has also filed a brief concerning the proper standard for the Appointing Authority to apply when deciding challenges for cause.

Military Commission Procedural Provisions on Challenges for Cause

The Appointing Authority appoints military commission members "based on competence to perform the duties involved" and may remove members for "good cause." DoD Directive No. 5105.70, "Appointing Authority for Military Commissions," paragraph 4.1.2 (Feb. 10, 2004) [hereinafter DoD Dir. 5105.70]. *See also* DoD Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," Section 4A(3) (Mar. 21, 2002) [hereinafter MCO No. 1]; MCI No. 8 at paragraph 3A(1). To be qualified to serve as a member or an alternate member of a military commission, each person "shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty." MCO No. 1 at Section 4A(3). *Compare* Article 25(a), Uniform Code of Military Justice, 10 U.S.C. § 825(a) [hereinafter UCMJ].

The Presiding Officer may not decide challenges for cause but must "forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue."[5] MCI No. 8 at paragraph 3A(3). In the *Hamdan* and *Hicks* cases, consistent with this authority, the Presiding Officer has scheduled due dates for motions, motion hearing dates, and tentative trial dates pending the Appointing Authority's decision on these challenges.

"In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission." MCI No. 8 at paragraph 3A(1).

The term "good cause" is not defined in any of these provisions but is defined in the Review Panel instruction as including, but not limited to, "physical disability, military exigency, or other circumstances that render the member unable to perform his duties."

[5] On September 15, 2004, the Appointing Authority sent the following email to the Presiding Officer: "Please forward your observations and recommendations relating to challenges for cause." That same day, the Presiding Officer provided written recommendations concerning the recommended standard for deciding challenges for cause and his recommendations on the challenges against each member in the *Hamdan* and *Hicks* cases.

DoD Military Commission Instruction No. 9, "Review of Military Commission Proceedings," paragraph 4B(2) (Dec. 26, 2003). This is the same definition of good cause that a convening authority or a military judge uses to excuse a court-martial member after assembly of the court. *See* Manual for Courts-Martial, United States, Rules for Courts-Martial 505 (2002) [hereinafter RCM].

Parties' Positions Concerning the Standard for Determining Challenges for Good Cause

At the request of the Presiding Officer, defense counsel in *Hamdan*, *Hicks*, and *al Qosi*, as well as the Chief Prosecutor, filed briefs concerning the appropriate standard for the Appointing Authority to apply when deciding challenges for "good cause." The defense briefs in *Hicks* and *al Qosi* advocate the adoption of the standard set forth in RCM 912(f) including the "implied bias" provision which states that a member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the [military commission] free from substantial doubt as to legality, fairness, and impartiality." RCM 912(f)(1)(N). While making some different arguments in support of their position, defense counsel in *Hicks* and *al Qosi* advocate that the RCM 912(f)(1)(N) court-martial standard should be applied without change in military commissions. Under this standard, implied bias is determined via a supposedly objective standard, the test being whether a reasonable member of the public would have substantial doubt as to the legality, fairness, and impartiality of the proceeding. *See United States v. Strand*, 59 M.J. 455, 458-59 (2004). Defense counsel in *Hamdan* agree that the RCM 912(f)(1)(N) court-martial standard should be applied to military commissions, but argue that the reasonable member of the public must be taken from the international community.

The brief filed by the Chief Prosecutor recommends the following standard be adopted: "A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member's impartiality might reasonably be questioned based upon articulable facts."

The Presiding Officer recommends that a challenge for cause should be granted "if there is good cause to believe that the person could not provide a full and fair trial, impartially and expeditiously, of the cases brought before the Commission. I do not believe that there is an 'implied bias' standard in the relevant documents establishing the Commissions." (Mem. for Appointing Authority, Military Commissions at paragraph 2, Sept. 15, 2004.)

The parties cite no controlling standard for deciding challenges for cause before military commissions. Nevertheless, it is helpful to examine the challenge standards in courts-martial, United States federal practice, and under international practice when deciding the appropriate challenge standard for military commissions.

Applicability of the Uniform Code of Military Justice and the Manual for Courts-Martial to Military Commissions

As explained below, while some of the provisions of the UCMJ expressly apply to military commissions, none of the provisions of the Manual for Courts-Martial, including the implied bias standard endorsed by defense counsel, apply to military commissions. Article 21 of the UCMJ provides:

> § 821. Art. 21 Jurisdiction of courts-martial not exclusive
>
> The provisions of this chapter conferring jurisdiction upon courts-marital do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[6]

UCMJ art. 21. Article 36 of the UCMJ states:

> § 836. Art. 36 President may prescribe rules
>
> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, *military commissions* and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter* [10 U.S.C. §§ 801-946].
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

UCMJ art. 36 (emphasis added). In 1990, the phrase "and shall be reported to Congress" was deleted from the end of subsection (b). *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Section 1301, 104 Stat. 1301 (1990).

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[6] As recently as November 22, 2000, less than one year before the 9/11 attacks, Congress again recognized the independent jurisdiction of military commissions. *See* Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523 (adding a section entitled "Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States," 18 U.S.C. § 3261 (2000)). 18 U.S.C. § 3261(c) states that "[n]othing in this chapter [18 U.S.C. §§ 3261 et seq.] may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." *Id.*

Consistent with this Congressional authority, on November 13, 2001, the President entered the following finding:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833, Section 1(f) (Nov. 16, 2001) [hereinafter President's Military Order].

Accordingly, the Manual for Courts-Martial does not apply to trials by military commissions because of the congressionally authorized finding in the President's Military Order. However, the President's statutory authority to promulgate different trial rules for military commissions is not unlimited. Military commission trial procedures must comply with two statutory conditions contained in the Uniform Code of Military Justice. First, all such rules and regulations shall be "uniform insofar as practicable." UCMJ art. 36(b).

Second, any such rule or regulation "may not be contrary to or inconsistent with" the Uniform Code of Military Justice. UCMJ art. 36(a). Most of the UCMJ's provisions specifically apply to courts-marital only, but some also expressly apply to military commissions as well. For example, Articles 21 (jurisdiction), 28 (court reporters and interpreters), 37(a) (unlawful command influence), 47 (refusal to appear or testify), 48 (contempts), 50 (admissibility of records of courts of inquiry), 104 (aiding the enemy), and 106 (spies) all expressly apply to military commissions.

Article 41 of the UCMJ discusses challenges for cause, but is expressly applicable only to trials by court-martial and does not prescribe the standard to use when deciding a challenge for "cause." *See* UCMJ art. 41(a)(1). Article 29 of the UCMJ provides that no member of a court-martial may be excused after the court has been assembled "unless excused as a result of a challenge, excused by the military judge *for physical disability or other good cause*, or excused by order of the convening authority for good cause." UCMJ art. 29(a) (emphasis added).

In historical military jurisprudence, a general statement or assertion of bias was not a proper challenge. The challenge had to allege specific facts and circumstances demonstrating the basis of the alleged bias. *See generally* William Winthrop, *Military Law and Precedents* 207 (Government Printing Office 1920 reprint) (1896). Challenges

"for favor," as implied bias challenges were historically known, did not, by themselves, imply bias.

> [T]he question of their sufficiency in law being wholly contingent upon the testimony, *which may or may not, according to the character and significance of all the circumstances raise a presumption of partiality.* Such are challenges founded upon the personal relations of the juror and one of the parties to the case; their relationship, when not so near as to constitute [actual bias]; the entertaining by the juror of a qualified opinion or impression in regard to the merits of the case; his having an unfavorable opinion of the character or conduct of the prisoner; his having taken part in a previous trial of the prisoner for a different offence, or of another person for the same or a similar offence; or some other incident, no matter what . . . which, alone or in combination with other incidents, may have so acted upon the juror that his mind is not 'in a state of neutrality' between the parties.

Id. at 216 (emphasis added). In such cases, the question of whether the member is or is not biased "is a question of *fact* to be determined by the particular circumstances in evidence." *Id.* at 216-17 (emphasis in original).

Challenges for Cause in United States Federal Courts

In federal practice, the seminal case on implied bias is *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (boldface added):

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury **capable and willing to decide the case solely on the evidence before it**, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

In an often cited concurring opinion, Justice O'Connor writes that:

> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the

> juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

Id. at 222.

The doctrine of implied bias is "limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Brown v. Warden*, No. 03-2619, 2004 U.S. App. LEXIS 13944, at 3 (3rd Cir. July 6, 2004 unpublished) (quoting *Person v. Miller,* 854 F.2d 656, 664 (4th Cir. 1988)). "The implied bias doctrine is not to be lightly invoked, but 'must be reserved for those extreme and exceptional circumstances that leave serious question whether the trial court subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.'" *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1261 (2d Cir. 2000) (quoting *Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996)).

Military courts-martial practice also purports to follow the *Smith* Supreme Court precedent, with the highest military appellate court concluding that "implied bias should be invoked rarely." *See United States v. Warden*, 51 M.J. 78, 81 (2000); *see also United States v. Lavender*, 46 M.J. 485, 488 (1997) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). In practice, however, the U. S. Court of Appeals for the Armed Forces has been more liberal in granting implied bias challenges than the various U.S. Federal Circuit Courts of Appeals. But even in courts-martial, military appellate courts look at the "totality of the factual circumstances" when reviewing implied bias challenges. *See United States v. Strand*, 59 M.J. 455, 459 (2004).

The American Bar Association recently proposed a minimum standard for deciding challenges for good cause:

> At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, or may be unable or unwilling to hear the subject case fairly and impartially. . . . In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.

American Bar Association, Standards Relating to Jury Trials, Draft, September 2004.

International Standards for Challenges for Cause

International law generally provides for the right of an accused to an impartial tribunal. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) statutorily establish impartiality as a judicial requirement. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 13, U.N. Doc. S/25704, 32 ILM 1159, 1195 (May 3, 1993); Statute of the International Criminal Tribunal for Rwanda, art. 12, U.N. Doc. S/Res/955, U.N. SCOR 3453, 33 ILM 1598, 1607 (Nov. 8, 1994). The Rules of Evidence and Procedure of both the ICTY and ICTR state that "[a] judge may not sit on a trial . . . in which he has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality." Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Rule 15, U.N. Doc. IT/32/Rev. 32 (Aug. 12, 2004); Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 15, U.N. Doc. ITR/3/REV. 1 (June 29, 1995).

Several international treaties and conventions recognize the right to an impartial tribunal. The European Convention on Human Rights and the International Covenant on Political and Civil Rights guarantee the accused a fair trial and recognize the right to an impartial tribunal. In nearly identical language, the standards in both documents require a criminal tribunal to be fair, public, independent, and competent. *See* European Convention on the Protection of Human Rights and Fundamental Freedoms, art. 6, Section 1, *opened for signature*, 213 UNTS 221 (Nov. 4, 1950); International Covenant on Political and Civil Rights, art. 14, Section 1, 999 UNTS 171 (Dec. 16, 1966).

The European Court of Human Rights has reviewed numerous cases for alleged violations of the right to an impartial tribunal or judge. In evaluating impartiality, the Court consistently emphasizes that judges and tribunals must appear to be impartial. *Piersack v. Belgium*, Series A, No. 53 (Oct. 1, 1982). In *Piersack v. Belgium*, the Court noted that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view. *Id.* at para. 30(a). The European Court of Human Rights affirmed this consideration in *Gregory v. United Kingdom*, stating that "[t]he Court notes at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public . . . ." *Gregory v. United Kingdom*, 25 Eur. H.R. Rep. 577, para. 43 (Feb. 25, 1997). As a result of an overriding need to maintain an appearance of impartiality, national legislation often establishes specific relationships or perceived conflicts that disqualify a judge on the basis of appearances rather than an objective finding that a judge is indeed impartial.

In evaluating whether there is an appearance of impartiality that gives rise to a challenge of a judge or juror, the European Court of Human Rights noted that lack of impartiality includes situations where there is a "legitimate doubt" that a juror or judge can act impartially. *Piersack*, Series A, No. 53 at para. 30. Further, it is necessary to "examine whether in the circumstances there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury . . . ." *Gregory*, 25 Eur. H.R. Rep. at para. 45. Despite this seemingly expansive approach, the European

Court of Human Rights has ruled consistently that a judge is presumed to be impartial unless proven otherwise. *LeCompte, van Leuven and De Meyeres v. Belgium*, Series A, No. 43 (June 23, 1981). Thus, as a practical matter, it is the rare case in which the impartiality of a judge is successfully challenged on the basis of a judge's relationship to others when such relationship is not specifically enumerated as a disqualifying factor under national legislation.

The Appeals Chamber for the International Criminal Tribunal for Rwanda has exhaustively analyzed the European Court of Human Rights cases, as well as cases from common law states, and developed the following standard to interpret and apply the concept of impartiality:

> [A] Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> > A. A judge is not impartial if shown that actual bias exists.
> > B. There is an unacceptable appearance of bias if:
> > i. a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties . . . ; or
> > ii. the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

Prosecutor v. Furundzija, para. 189, Case No. I IT-95-17/1-A, Judgment, (July 21, 2000).

The Appeals Chamber noted that an informed observer is one who takes into account the oath, as well as any training and experience of the juror. On the basis of this test, the Appeals Chamber found no violation, holding that the judge's membership in an international organization was one of the very factors that qualified her as a judge at the Tribunal and thus such membership could not be the basis for a claim of bias. The Chamber also noted that judges may have personal convictions that do not amount to bias absent other factors. *Id.* at para. 203.

Appointing Authority Standard for Deciding Challenges for Cause

The President's Military Order establishes the trial standard that military commissions will provide "a full and fair trial, with the military commission sitting as the triers of both fact and law." President's Military Order at Section 4(c)(2). Considering all of the above, the Appointing Authority will apply the following standard, which includes a limited implied bias component, when deciding challenges for cause against any member of a military commission:

> Based on the totality of the factual circumstances, a challenge for cause will be sustained if the member has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by commission law to serve on the commission, or may be unable or unwilling to hear the case fairly and impartially considering only evidence and arguments presented in the accused's trial.

In applying this standard, a member should be excused if the record establishes a reasonable and significant doubt concerning his or her ability to act fairly and impartially. Additionally, the following factors will be considered, although the existence of any one of these factors is not necessarily an independent ground warranting the granting of a challenge and no one factor necessarily carries more weight than another. In each case the challenge will be decided based upon the above standard, taking into account any of these factors that may be applicable and considering the totality of the factual circumstances in the case.

(1) Has the moving party established a factual basis to support the challenge?

(2) Does the non-moving party oppose the challenge?

(3) What recommendation, if any, did the Presiding Officer make concerning the challenge? *See* MCI No. 8 at paragraph 3A(3).

(4) Does the record demonstrate that the challenged member possesses sufficient age, education, training, experience, length of service, judicial temperament, independence, integrity, intelligence, candor, and security clearances, and is otherwise competent to serve as a member of a military commission? *See* MCO No. 1 at Sections 4A(3)-(4); DoD Dir. 5105.70 at paragraph 4.1.2; UCMJ art. 25(d)(2).

(5) Does the record establish that the challenged member is able to lay aside any outside knowledge, association, or inclination, and decide the case fairly and impartially based upon the evidence presented to the commission? *See Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) (citations omitted).

Examples of good cause that would normally warrant a member's removal from a military commission include situations where the member does not meet the qualifications to sit on or has not been properly appointed to a military commission; has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged; has become physically disabled; or has intentionally disclosed protected information from a referred military commission case without proper authorization.

Consideration of Individual Challenges

LTC C

The defense challenges to LTC C are based upon his ongoing strong emotions and anger because of 9/11 and his real and present apprehension that his family may be harmed if he participates in these commissions. At trial, the prosecution opposed this challenge. However, the post-hearing brief filed by the Chief Prosecutor does not oppose this challenge. The Presiding Officer believes that there is "some cause" to grant a challenge against LTC C because his responses would provide a reasonable person cause to doubt his ability to provide an impartial trial.

During his voir dire in *Hamdan*, LTC C acknowledged that he indicated in his written questionnaire that he had a desire to seek justice for those who perished at the hands of the terrorists, that he was very angry about the events of 9/11, and that he still had strong emotions about what happened. LTC C further stated that he believed terrorist organizations would seek out both he and his family for revenge simply because of his participation in these commissions. He also stated that at one point he held the opinion that the persons being detained at Guantanamo Bay were terrorists.

During his voir dire in *Hicks*, LTC C stated that he would try to put his emotions aside and look at the case objectively. He reaffirmed that he had participated in discussions with other soldiers where he probably stated that all of the detainees at Guantanamo Bay were terrorists, but that in retrospect that was no longer his opinion.

LTC C's past statements concerning the detainees at Guantanamo, coupled with his ongoing strong emotions concerning the 9/11 attacks, create a reasonable and significant doubt as to whether he could lay aside his emotions and judge the evidence presented in these cases in a fair and impartial manner. Accordingly, based on the totality of the factual circumstances, the challenge for cause against LTC C will be granted.

COL S

On 9/11, COL S [redacted] COL S

attended his funeral and met with his family. COL S also visited Ground Zero about two weeks after the attack [redacted]

The defense challenges to COL S are based upon his emotional reaction when visiting Ground Zero as well as his attendance at the funeral [redacted] The prosecution opposed this challenge at trial. The post-hearing brief filed by the Chief Prosecutor also opposes this challenge, without elaboration.

The Presiding Officer's written recommendation is that there is no cause to grant a challenge against COL S:

> His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. His method of speaking, his deliberation when responding, his ability to understand not only the question but the subtext of the question - all of these show that he is a bright attentive officer who will be able to provide the unbiased perspective which is required by the President for this trial. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases. Based on my personal observations of COL S [] while he was discussing the death of [redacted] he was not unduly affected by the individual death - he regretted the death, but he has had a long career during which he has had occasion to see many Marines die.

In the *Hamdan* record, COL S described his reaction to attending the funeral of [redacted]

> I have been a battalion commander. I have been a regimental commander. I have been in the Marine Corps 28 years. It is not the first Marine that, unfortunately, that I have seen die, whether he was on or off duty in the Marine Corps. The death of every Marine I have known or served with has a deep affect on me, but it is no different that -- that Marine's worth is no more or less than the other Marines, unfortunately, that I have served with who have been killed.

In the *Hamdan* record, COL S described his emotions while visiting Ground Zero: "It is a sad sight. A lot of destruction there. Hard to fathom what was there and what

was left. . . . I would imagine that everyone who saw it was angry." COL S stated that he did not still think about his visit to Ground Zero.

In the *Hicks* record, COL S described his emotions while visiting Ground Zero as sadness rather than anger, again noting that there was a lot of destruction and loss of life. COL S responded as follows when asked how he would separate his 9/11 feelings and personal experiences from the evidence presented at trial:

> COL S: It's separate things.
> DC: Can you just explain for us how you go about doing that. Because we – you understand that we need to know and be confident that you can be a fair commissioner, separate those things out, and give Mr. Hicks the fair trial that he's due and that we understand that you understand is your responsibility.
> COL S : I understand. I've read these charges. I understand that the fact that anybody's charged with anything doesn't [im]ply more than that they're charged with it. And I make no connection in my mind between those charges and my visit to the World Trade Center.
> DC: Nothing further, thank you.

COL S's written questionnaire and his voir dire in *Hicks* both indicate that, for a non-attorney, COL S has considerable prior military legal experience. COL S stated that he had previously served as both a witness and a member (juror) in courts-martial; that he has served as a special court-martial convening authority on [redacted] different occasions; and has attended specialized military legal training in the form of Senior Officer's Legal Courses and a Law of Land Warfare Course. He also conducted numerous summary courts-marital where he made determinations of both law and fact, just as members of military commissions are required to do.

As the defense stated in their brief in the *Hicks* case, "most Americans, and possibly all military personnel, are gripped by strong emotion, whether sadness, anger, confusion, frustration, fear, or revenge, at the memory of the September 11th attacks . . . ." The issue, however, is not whether a potential military commission member experienced a strong emotional reaction to events that happened over three years ago, or even whether that person candidly acknowledged such feelings, but rather is the member still experiencing those emotions such that he is unable to lay aside those feelings and render a verdict based solely on the evidence presented to the military commission. As the United States Supreme Court has stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best

> qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*

Irvin, 366 U.S. at 722-23 (citations omitted) (emphasis added).

Unlike LTC C, nothing in either record demonstrates that COL S is experiencing any ongoing emotions as a result of his 9/11 experiences. The Presiding Officer's recommendation states that there was nothing in COL S's demeanor during voir dire that indicated that he was unduly affected by the death of [redacted] COL S, who has considerable legal training and experience, clearly stated that he can and will try these cases without reference to his 9/11 experiences. Nothing in either record creates a reasonable and significant doubt as to COL S's ability to decide these cases fairly and impartially, considering only evidence and arguments presented to the commissions. Accordingly, the challenge for cause against COL S will be denied.

LTC T and COL B

The defense challenged both LTC T and COL B based upon their involvement with [redacted] at the time Mr. Hamdan and Mr. Hicks were apprehended.

The defense challenged LTC T based upon his role as an [redacted] officer on the ground in [redacted] from approximately [redacted] the period during which both Mr. Hamdan and Mr. Hicks were captured and detained. At trial, the prosecution opposed this challenge. The post-hearing brief filed by the Chief Prosecutor does not oppose this challenge.

The Presiding Officer concluded that there is cause to grant a challenge against LTC T because:

> "his activities [redacted] make his participation problematic in regards to his knowledge of activities in the [redacted] - thereby possibly impacting on his impartiality. He, in fact, was a person who could legitimately be viewed as a possible victim in this case. Removing LTC T [] would insure [redacted] and the

modus operandi of both sides would not have an undue influence upon the deliberations of the panel."

During his voir dire in *Hamdan*, LTC T stated that he is an [redacted] officer who was assigned to a [redacted] that deployed both to [redacted] as part of [redacted] and to [redacted] as part of [redacted] with the mission to capture enemy personnel, but that he was not involved with the capture of Mr. Hamdan. He stated that it is possible that he may have seen [redacted] on Mr. Hamdan, but he has no memory of Hamdan's case. During his voir dire in *Hicks*, LTC T stated he was attached to a [redacted] as an [redacted] while deployed to [redacted]

During a closed session of trial, the *Hamdan* defense counsel challenged COL B based upon his role in transporting [redacted] In the open session, defense challenged COL B based on the appearance of unfairness because of his prior duty [redacted] During both open and closed sessions of trial, the *Hicks* defense counsel challenged COL B because his knowledge of [redacted] specifically his knowledge of the transportation of detainees, is such that he would be better suited to be a witness than a commission member, and further that his links with personnel in theater were such that he could be characterized as a victim.

At trial, the prosecution opposed the challenge against COL B. The post-hearing brief filed by the Chief Prosecutor does not oppose this challenge. The Presiding Officer's opinion is that there is no cause to grant a challenge against COL B.

In his written questionnaire, COL B indicated that on 9/11 he was newly assigned as the [redacted] As a result of 9/11, he was involved in developing and executing war plans [redacted] He also indicated that he was intimately familiar with [redacted] He was physically deployed to [redacted]

During voir dire, COL B stated that he was not involved in making the determinations of what detainees were eligible for transfer to Guantanamo [redacted] He specifically remembered Mr. Hicks' name and that he was Australian. He stated that he probably knew which U.S. forces captured Mr. Hicks, but cannot currently recall that information. He also stated that in his role [redacted]

Based on the totality of the factual circumstances, including the classified voir dire of LTC T and COL B which were reviewed but not discussed herein, the challenges for cause against both LTC T and COL B will be granted. Both officers were actively involved in planning or executing sensitive [redacted] in both [redacted] and [redacted] and are intimately familiar with the operations and deployments in [redacted] These experiences create a reasonable and significant doubt as to the ability of these two members to decide these cases fairly and impartially.

Presiding Officer

Hamdan's defense counsel challenged the Presiding Officer on four grounds:

(1) He is not qualified as a judge advocate based on being recalled from retired service and not being an active member of any Bar Association at the time he was recalled;

(2) As an attorney, he will exert improper influence over the other non-attorney members;

(3) Multiple contacts, in person or through his assistant, with the Appointing Authority thus creating the appearance of unfairness; and

(4) Previously formed an opinion on the accused's right to a speedy trial as expressed in a July 15, 2004, meeting with counsel from both the prosecution and the defense.

Hicks' defense counsel challenged the Presiding Officer on the same four general grounds. At trial, the prosecution in both cases opposed the challenge against the Presiding Officer. In a subsequent brief, the Chief Prosecutor recommended the Presiding Officer evaluate whether he should remain on the commission in light of the implied bias standard proposed by the prosecution as previously described herein.

Presiding Officer's Judge Advocate Status

Military Commission Order No. 1 requires that the "Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force." MCO No. 1 at Section 4A(4). The Presiding Officer's written questionnaire, dated August 18, 2004, indicates that he currently is, and has been, an associate member of the Virginia State Bar since 1977 and that he has never practiced law in the civilian sector.

In a written brief, Hamdan's defense counsel asserts the following:

1) All Army judge advocates are required to remain in good standing in the bar of the highest court of a state of the United States, the District of Columbia, or a Federal Court. U.S. Dep't of Army Reg. 27-1, "Judge Advocate Legal Services," para. 13-2h(2) (Sept. 30, 1996) [hereinafter AR 27-1].

2) The Virginia State Bar maintains four classes of membership: active, associate, judicial, and retired. Associate members are entitled to all the privileges of active members except that they may not practice law (in Virginia).

3) Because the Presiding Officer is only an associate member of the Virginia Bar, he is not authorized to practice law in the Army Judge Advocate General's Corps.

In Virginia, the term "good standing" applies to both associate and active members and refers to whether or not the requirements to maintain that specific level of membership have been met. *Unauthorized Practice of Law*, Virginia UPL Opinion 133 (Apr. 20, 1989), *available at* http://www.vsb.org/profguides/upl/opinions/upl_ops/upl_Op133. "Good standing" generally means that the attorney has not been suspended or disbarred for disciplinary reasons and has complied with any applicable rules concerning payment of bar membership dues and completion of continuing legal education requirements.

As the proponent of AR 27-1, The Judge Advocate General (TJAG) of the Army is the appropriate authority to determine whether associate membership in the Virginia Bar constitutes "good standing" as contemplated in that regulation. The record establishes that the Presiding Officer's status with the Virginia Bar has not changed since he was admitted to the Virginia Bar in 1977. The record also shows that, as an associate member of the Virginia Bar, he practiced as an Army judge advocate for twenty-two years, including ten years as a military judge. Prior to his service as a military judge, the Army TJAG personally certified the Presiding Officer's qualifications to be a military judge as required by the Uniform Code of Military Justice. *See* UCMJ art. 26(b). Accordingly, this challenge is without merit.

Undue Influence over Non-attorney Members of the Commission

Under the President's Military Order, the commission members sit as "triers of both fact and law." President's Military Order at Section 4(c)(2). The defense asserts that this particular Presiding Officer will use his experience as a military trial judge and attorney to exert undue influence over the non-attorney members of the commission when deciding questions of law. In *Hamdan*, the Presiding Officer addressed this issue with the members as follows:

> Members, later I am going to instruct you as follows: As I am the only lawyer appointed to the commission, I will instruct you and advise you on the law. However, the President has directed that the commission, meaning all of us, will decide all questions of law and fact. So you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in

> court, or in motions. In closed conferences, and during deliberations, my vote and voice will count no more than that of any other member. Can each member follow that instruction?
> Apparently so.
>
> Is there any member who believes that he would be required to accept, without question, my instruction on the law?
> Apparently not.

The exceptional difficulty and pressure with being the first Presiding Officer to serve on a military commission in over 60 years cannot be overstated. The Presiding Officer must conduct the proceedings with independent and impartial guidance and direction in a trial-judge-like manner. At the same time, the Presiding Officer must ensure that the other non-attorney members of the commission fully exercise their responsibilities to have an equal vote in all questions of law and fact. There is nothing in either record that remotely suggests that this Presiding Officer does not understand the delicate balance that his responsibilities require. Accordingly, the challenge on this basis is without merit.

Relationship with the Appointing Authority Creates Appearance of Unfairness

The precise factual basis for challenge on this ground was not very well articulated by counsel in either *Hamdan* or *Hicks*. In *Hamdan*, the defense counsel's entire oral argument on this ground was as follows:

> We are also challenging based on the multiple contacts that you have had, either through your assistant, or through yourself, with the [A]ppointing [A]uthority. I understand that you said that this is not going to influence you in any way. We believe that it creates the appearance of unfairness, and at least at that level, we challenge on that.

Defense counsel in *Hamdan* did not further articulate a factual basis for this challenge in their post-hearing brief.

In *Hicks*, defense counsel orally adopted the same challenge grounds as *Hamdan* including "the relationship with the appointing authority" and the "perception of the public" under the implied bias standard in RCM 912(f)(1)(N). Defense counsel in *Hicks* did not further articulate a factual basis for this challenge in their post-hearing brief, even though they individually and rather extensively discussed the factual basis for their challenges against the other four challenged members.

The gist of this challenge appears to be that defense counsel perceive that a close personal friendship exists between the Presiding Officer and the Appointing Authority,

and that the Presiding Officer will be viewed as, or act as, an agent of the Appointing Authority rather than an independent, impartial Presiding Officer. Alternately stated, the Appointing Authority will somehow appear to influence the performance of the Presiding Officer. To evaluate this challenge, it is necessary to understand the traditional social and professional relationships between a convening authority and officer members of courts-martial under the Uniform Code of Military Justice, as well as the criminal sanctions against unlawfully influencing the action of a member of a court-martial or a military commission.

In addition to duty or professional responsibilities, military officers of all grades, and often their spouses, are expected by custom and tradition to participate in a wide variety of social functions hosted by senior commanding officers or general officers. Such functions include formal New Year's Day receptions, formal Dining Ins (dinners for officers only), formal Dining Outs (dinners for officers and spouses/dates), formal Dinner Dances, Change of Command ceremonies, promotion ceremonies, award ceremonies, informal Hail and Farewell dinners (welcoming new officers and "roasting" departing officers), retirement ceremonies, and funerals of members of the unit. Because attendance at all such social functions is customary, traditional, and expected, such attendance is not indicative of close personal friendships among the participants.

In most cases, commanders who are authorized to convene general courts-martial under the UCMJ are high-ranking general or flag officers. *See generally* UCMJ art. 22. The eligible "jury pool" of officers for a general court-martial includes officers assigned or attached to the convening authority's command or courts-martial jurisdiction. The convening authority is required to select officers for courts-martial duty, who, in his personal opinion, are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2). Consequently, convening authorities frequently select as court members officers who they know well and whose judgment they trust.

To ensure that these professional and social relationships between convening authorities and court members do not affect the impartiality or fairness of trials by courts-martial or military commissions, and to maintain the neutrality of the convening authority, Congress enacted Article 37(a), UCMJ, "Unlawfully influencing action of court."[7] This is one of the UCMJ articles that expressly applies to military commissions. This statute prohibits any "attempt to coerce, or by any authorized means, influence the

[7] UCMJ art. 37(a) states in pertinent part (emphasis added):

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial *or any other military tribunal or any member thereof*, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

action of [a] . . . military tribunal or any member thereof, in reaching the findings or sentence in any case." UCMJ art. 37(a). Additionally, the knowing and intentional violation of the procedural protection afforded by Article 37(a), UCMJ, is a criminal offense in that any person subject to the UCMJ who "knowingly and intentionally fails to enforce or comply with any provision of this chapter [10 U.S.C. §§ 801-946] regulating the proceedings before, during, or after trial of an accused" may be punished as directed by a court-martial. UCMJ art. 98(2). The Presiding Officer, as a retired Regular Army officer recalled to active duty, and the Appointing Authority, as a retired member of the Regular Army, are both persons subject to trial by court-martial under the UCMJ. *See* UCMJ art. 2(a)(1),(4).

Article 37(a), UCMJ, protects not only the impartiality of courts-martial and military commissions, but also the judicial acts of a convening authority (appointing authority). "A convening authority must be impartial and independent in exercising his authority . . . . The very perception that a person exercising this awesome power is dispensing justice in an unequal manner or is being influenced by unseen superiors is wrong." *United States v. Hagen*, 25 M.J. 78, 86-87 (C.M.A., 1987) (Sullivan, J., concurring) (citations omitted). Even though a convening authority decides which cases go to trial, he or she must remain neutral throughout the trial process. *See, e.g. United States v. Davis*, 58 M.J. 100, 101, 103 (C.A.A.F. 2003) (stating that a convicted servicemember is entitled to individualized consideration of his case post-trial by a neutral convening authority). The Appointing Authority for Military Commissions, as an officer of the United States appointed by the Secretary of Defense pursuant to the Constitution and Title 10, United States Code, has a legal and moral obligation to execute the President's Military Order in a fair and impartial manner, consistent with existing statutory and regulatory guidance.

In his written questionnaire for counsel, the Presiding Officer stated the following about his relationship with the Appointing Authority (emphasis added):

> b. Mr. Altenburg:
>
> 1. I first met (then) CPT Altenburg in the period 1977-1978, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.
>
> 2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for [another judge] and me so that we would be properly outfitted for trials in Saudi Arabia.

3. During the period 1992 to 1995, (then) COL Altenburg was the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg while I was the Chief Circuit Judge, 2nd Judicial Circuit, with duty station at Fort Bragg. Our offices were in the same building. My wife, (then) MAJ M [], was the Chief of Administrative Law in the SJA office from 1992 to 1994. During this period, Mr. Altenburg and I became friends. We saw each other about twice a week and sometimes more than that. We generally attended all of the SJA social functions. He and his wife (and children – depending upon which of his children were in residence at the time) had dinner at our house at least three times in the three years we served at Fort Bragg. I attended several social functions at his quarters on post. *Though he was a convening authority and I was a trial judge, we were both disciplined enough to not discuss cases. I am sure there were times when he was not pleased with my rulings.*

4. From summer 1995 to summer 1996 when Mr. Altenburg was in Washington and I was at Fort Bragg, he and I probably talked on the telephone three or four times. I believe that he stayed at my house one night during a TDY to Fort Bragg (but I am not certain).

5. During the period June 1996 to May 1999, I was stationed at Mannheim, Germany and Mr. Altenburg was in Washington. Other than the World-Wide JAG Conferences in October of 1996, 1997, and 1998, I did not see nor talk to MG Altenburg except once--in May of 1997, I attended a farewell [ceremony] hosted by MG Altenburg for COL John Smith. In May 1999, MG Altenburg presided over my retirement ceremony at The Judge Advocate General's School and was a primary speaker at a "roast" in my honor that evening.

6. *Since my retirement from the Army on 1 July 1999, Mr. Altenburg has never been to our house and we have never been to his.* From the time of my retirement until the week of 12 July 2004, I have had the occasion to speak to him on the phone about five to ten times. I had two meetings or personal contacts with him during that period. First, in July or August 2001 when I was a primary speaker at a "roast" in MG Altenburg's honor at Fort Belvoir upon the occasion of his retirement. Second, in November (I believe) 2002, I attended his son's wedding in Orlando, Florida [near the Presiding Officer's home].

> 7. I sent him an email in December 2003 when he was appointed as the Appointing Authority to congratulate him. I also sent him an email in the spring of 2004 when I heard that he had named a Presiding Officer. Sometime in the spring of 2004, I called his house to speak to his wife. After we talked, she handed the phone to Mr. Altenburg. He explained that setting up the office and office procedures was tough. I suggested that he hire a former JA Warrant Officer whom we both knew.
>
> 8. *To the best of my memory, Mr. Altenburg and I have never discussed anything about the Commissions or how they should function. Without doubt, we have never discussed any case specifically or any of the cases in general. I am certain that since being appointed a Presiding Officer we have had no discussions about my duties or the Commission Trials.*

The voir dire in *Hamdan* did not pursue the nature of any personal relationship between the Presiding Officer and the Appointing Authority. During his voir dire in *Hicks*, the Presiding Officer stated the following concerning his relationship with the Appointing Authority (emphasis added):

DC: Now, I want to explore your relationship with the appointing authority.
PO: Okay.
DC: You have known Mr. Altenburg [since] 1977, 1978?
PO: Yes, sometime in that frame.
DC: And you had a professional affiliation for a period of time?
PO: As I said before my knowledge of Mr. Altenburg up until 1992 was minimal, I mean, really. Now he was the SJA of the 1AD, the 1st Armored Division, and I was over on the other side of Germany. We were at Bragg at the same time, but like I said I maybe talked to him once, I think. You see people on post, but that is about it. He and I were on the same promotion list to major, but he had already left Bragg by then. In 92 he came to Bragg as the SJA and I was the chief circuit judge with my offices right there at Bragg in his building, and my wife was his chief of [Administrative Law]. So from 92 to 96 you could say that we had a close professional relationship and within, I don't know, a couple months it became a personal relationship.
DC: And when you retired in May of 1999, Mr. Altenburg presided over your retirement ceremony?
PO: Right, at the JAG school.
DC: And he was also the primary speaker at a roast in your honor that evening?
PO: Yes.
DC: And, in fact, when Mr. Altenburg retired in the summer of 2001 you were the primary speaker at his roast?

PO: No, there were three speakers. I was the only one who was retired and could say bad things about him.
DC: And you also attended his son's wedding in sometime in the fall of 2002?
PO: In Orlando, yeah.
DC: And you also contacted Mr. Altenburg when you learned that he became the appointing authority for these commissions?
PO: Right, I did.
DC: And you are aware that there were other candidates for the position of presiding officer?
PO: Yeah, uh-huh.
DC: Thirty-three others, in fact?
PO: Okay. No. What I know about the selection process I wrote. I don't know who else was considered and who else was nominated. Knowing the Department of Defense I imagine that all four services sent in -- excuse me, that there were lots of nominations and they went somewhere and they got to Mr. Altenburg somehow. I don't know how many other people were nominated.
DC: So the ultimate question is how would you answer the concerns of a reasonable person who might say based on this close relationship with Mr. Altenburg that there is an appearance of a bias, or impartiality -- or partiality rather and that you were chosen not because of independence or qualifications, but rather because of your close relationship with Mr. Altenburg, and how would you answer that concern?
PO: Well, *I would say first of all that a person who were to examine my record as a military judge -- and all of it is open source. All of my cases are up on file at the Judge Advocate General's office in DC -- could see at the time when I was the judge at Bragg, sitting as a judge alone, acquitted about six or seven of the people he referred to a court-martial. They could look at the record of trial and see that in several cases I reversed his personal rulings. They could look at my record as a judge and see that I really don't care who the SJA was in how I acted. So a reasonable person who took the time to examine my record would say, no, it doesn't matter.*

. . . .

P: *Sir, do you care what Mr. Altenburg thinks about any ruling or decision you might make?*
PO: *No.* You want to ask what I think Mr. Altenburg wants from me?
P: Do you know, sir?
PO: No, I asked would you like to ask me what I think he wants?
P: Yes, sir.
PO: Okay. *I think John Altenburg, based on the time that I have known him, wants me to provide a full and fair trial of these people. That's what he wants. And I base that on really four years of close observation of him and my knowledge of him. That's what I think he wants.*
P: Do you think there would be any repercussions for you if he disagreed with a ruling of yours or a vote of yours?
PO: You all went to law school; right?
P: Yes, sir.

PO: Remember that first semester of law school and everyone is really scared?
P: Yes, sir.
PO: Well, I went on the funded program and all the people around me were really scared, but I said to myself, hey the worst that can happen is I can go back to being an infantry officer, which I really liked. Well the worse thing that can happen here, from you all's viewpoint, if you think about that, is I go back to sitting on the beach. *I don't have a professional career. Mr. Altenburg is not going to hurt me.* Okay.
P: Yes, sir. Nothing further, sir.

There is no factual basis in either record to support granting a challenge against the Presiding Officer on this ground. The records establish no actual bias by the Presiding Officer as a result of his former, routine, social and professional relationships with the Appointing Authority, nor do the parties advocate any such actual bias. Even on an implied bias basis, no well-informed member of the public who understands the traditional social relationships among military officers and the criminal prohibitions against the Appointing Authority attempting to influence the Presiding Officer's actions would have any reasonable or significant doubt that this Presiding Officer's fairness or impartiality will be affected by his prior social contacts with the Appointing Authority.

Such a finding is consistent with federal cases reflecting that the mere fact that a judge is a friend, or even a close friend, of a lawyer involved in the litigation does not, by that fact alone, require disqualification of the judge. *See, e.g., Bailey v. Broder*, No. 94 Civ. 2394 (S.D.N.Y. Feb. 20, 1997) (holding that a showing of a friendship between a judge and a party appearing before him, without a factual allegation of bias or prejudice, is insufficient to warrant recusal); *In re Cooke*, 160 B.R. 701, 706-08 (Bankr. D. Conn. 1993) (stating that a "judge's friendship with counsel appearing before him or her does not alone mandate disqualification."); *United States v. Kehlbeck*, 766 F. Supp. 707, 712 (S.D. Ind. 1990) (stating "judges may have friends without having to recuse themselves from every case in which a friend appears as counsel, party, or witness."); *United States v. Murphy*, 768 F. 2d 1518, 1537 (7th Cir. 1985, cert. denied, 475 U.S. 1012 (1986) ("In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable."); *In re United States*, 666 F.2d 690 (1st Cir. 1981) (holding that recusal was not required in extortion trial of former democratic state senator whose committee, fifteen years ago, had investigated former republican governor when the judge had been chief legal counsel for the governor); and *Parrish v. Board of Commissioners*, 524 F.2d. 98 (5th Cir. 1975) (en banc) (holding that recusal was not required in class action case where judge was friends with some of the defendants and where judge stated his friendship would not affect his handing of the case).

Predisposition on Speedy Trial Motion

The fourth basis for challenge is that the Presiding Officer has formed an opinion, which he expressed at a July 15, 2004, meeting with counsel, that an accused has no right to a speedy trial in a military commission. Below are the pertinent portions of the voir dire in *Hamdan* on this issue (emphasis added).

DC: During that meeting on 15 July, did you express an opinion regarding speedy -- the right of any detainee to a speedy trial?
PO: No, I didn't.
DC: I wasn't at the meeting, but I was told that you did. I don't --
PO: Thank you.
DC: Did you mention speedy trial at all?
PO: Speedy trial was mentioned. Article 10 was mentioned, and there was some general conversation. I didn't take notes at the meeting. It was a meeting to tell people who I was and asking them to get -- start on motions and things.
DC: But you didn't expect -- while those things were mentioned, you don't recall expressing an opinion yourself?
PO: No. I didn't have any motions or anything.

. . . .

P: *Sir, the issue of speedy trial was brought up and we have, in fact, have notice of motions provided concerning speedy trial. Is there anything as you sit here right now which will impact your ability to fairly decide those motions?*
PO: *No.*

The following exchange occurred in the *Hamdan* commission after all voir dire had been completed and challenges made and the Presiding Officer was about to recess the commission until the Appointing Authority made a decision on the challenges:

DC: Yes, sir. It came to my attention after the voir dire that there was a tape made regarding the 15 July meeting between yourself and counsel. I'd like permission to send that tape along with the other matters that I'm submitting on your voir dire regarding your qualifications.
PO: And why would you like that?
DC: To go toward the idea of whether you have an opinion or not, sir.
PO: On the questions of?
DC: Speedy trial, sir.
PO: Okay. And the tape goes to show what?
DC: Your opinion at the time, sir. I have not yet transcribed it. If it doesn't show anything -- I am proceeding here based on what I've been told by other counsel.
PO: Okay. I would be -- let me think about this. Okay, let me think about this. I am reopening the voir dire of me. Explain to me -- ask me what you want about what I said or may have said on the 15th.
DC: Yes, sir. It's my understanding, sir, that on the 15th you expressed an opinion as to whether the accused have -- whether any detainee had a right to a speedy trial.
PO: Do you think that's correct or do you think that's in reference to Article 10?
DC: My understanding from counsel was that it referenced whether they would have a right to a speedy trial under Article 10 or rights, generally. I confess, sir, I have not heard the tape.
PO: Okay. Why don't you ask me if I am predisposed on that.
DC: Are you predisposed towards those issues, sir?

PO: I believe in the meeting -- I don't remember speedy trial, I remember Article 10 being mentioned, and I believe I said something to the effect of, Article 10, how does that come into play, or words to that effect. I did not know that my words were being taped, and I must confess that when I walked into the room that day I had no idea that Article 10 would come into play because I hadn't had an occasion to review Article 10. It is not something that usually comes up in military justice prudence -- jurisprudence. *So I'm telling you right now that I don't have a predisposition towards speedy trial.* However, although the tape was made without my permission, without the permission of anyone in the room, I do give you permission to send it to the appointing authority with the other matters.
DC: Sir, what I would like to ask, if I transcribe it, that I send it to you first.
PO: I don't want to see it.
DC: Yes, sir.
PO: Okay. Well, wait a second. Do you want to change -- do you want to add on anything to your challenge or stick with it?
DC: No, sir.
PO: How about you?
P: No objection to the tape being sent, sir.

Neither defense counsel nor the prosecution in the *Hicks* case asked any questions of the Presiding Officer concerning a possible predisposition on speedy trial.

In support of this challenge, Hamdan's defense counsel provided an edited transcript of the pertinent portions of the tape recording[8] of the July 15, 2004, meeting, which provides in part:

PO: Hicks has been referred to trial, right. There's no procedure that I've seen that requires an arraignment, has anyone seen anything like that? It requires [Hicks] be informed of the nature of the charges in front of the commission. Okay, uh, there's no such thing as a speedy trial clock in this thing. Right, has anybody seen a speedy trial?
Chief Prosecutor: Sir, I wouldn't even be commenting on that in light of the fact that I think [named defense counsel] believe Article 10 [UCMJ] applies to these proceedings so we ought to stay away from that issue.
DC (al Qosi): I don't think it is appropriate either sir.
Chief Prosecutor: We need to stay away from that.
DC (al Qosi): These are the subjects of motions that are going to be filed and your comments--
PO: I'm asking a question and you can all voir dire me on that, but how are we going to try Mr. Hicks?

[8] Counsel are reminded that audio recording of Commission proceedings is prohibited unless authorized by the Presiding Officer and that compliance with the Military Commission Orders and Instructions is a professional responsibility obligation for the practice of law within the Department of Defense. *See* MCO No. 1 at Section 6B(3); MCI No. 1 at paragraphs 4B,C.

Neither defense team cited any case law from any jurisdiction to support their argument that these facts warrant removal of the Presiding Officer. Generally speaking, "[a] predisposition acquired by a judge during the course of the proceedings will only constitute impermissible bias when 'it is so extreme as to display clear inability to render fair judgment.'" *United States v. Howard,* 218 F.3d 556, 566 (6th Cir. 2000) (quoting *United States v. Liteky,* 510 U.S. 540, 551 (1994)). Furthermore, "the mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir., 1976) (citing *Antonello v. Wunsch*, 500 F.2d 1260 (10th Cir. 1974)).

The transcripts reveal that on occasion, as in this instance, the Presiding Officer was too casual with his remarks. Some of the detainees at Guantanamo have been there for almost three years. Understandably, they and their attorneys recognize that the determination of what, if any, speedy trial rules apply to military commissions is an important preliminary matter that must be resolved by the members of the military commissions after considering evidence and arguments presented by the parties.

Although not artfully done, the Presiding Officer was trying to tell counsel at the July 15, 2004, meeting that there are gaps in the commission trial procedures that he and counsel will have to address. Prior to the Presiding Officer's comments about arraignment and speedy trial, counsel were advised that the Presiding Officer would be issuing written guidance addressing how to handle some of the gaps in the commission procedures. As the Presiding Officer stated at that meeting, there are no published commission procedures concerning the subjects of arraignment or speedy trial. He was using arraignment and speedy trial as examples of traditional military procedures that were not mentioned in military commission orders or instructions, and that he and the parties would have to address. In fact, just four days after this meeting, the Presiding Officer issued the first three memoranda in a series of Presiding Officer Memoranda, in the nature of rules of court, to address issues not fully covered by military commission orders or instructions.[9] There are currently ten Presiding Officer Memoranda addressing topics such as motions practice, judicial notice, access to evidence and notice provisions, trial exhibits, obtaining protective orders and requests for limited disclosure, witness requests, requests to depose a witness, alternatives to live witnesses, and spectators to military commissions.

During voir dire, the Presiding Officer expressly stated that he had formed no predisposition concerning how he would rule on speedy trial motions. Considering all of the above, the record fails to establish that the Presiding Officer's spontaneous remarks in an informal meeting demonstrates a clear inability to render a fair and impartial ruling on speedy trial motions or otherwise disqualifies him from performing duties as a Presiding Officer.

[9] Current versions of all Presiding Officer Memoranda may be found on the Military Commission web site, *available at* http://www.defenselink.mil/news/commissions.html.

DECISION

The challenges for cause against the Presiding Officer and COL S are denied. Effective immediately, the challenges for cause against COL B (the Marine), LTC T, and LTC C are granted and each of these members is hereby permanently excused from all future proceedings for all military commissions. The country is grateful for the professional, dedicated, and selfless service of these exceptional officers in this sensitive and important matter.

A military commission composed of the Presiding Officer, COL S, and COL B (the Air Force officer) will proceed, at the call of the Presiding Officer, in the cases of *United States v. Hamdan* and *United States v. Hicks*. No additional members or alternate members will be appointed. *See* MCO No. 1 at Section 4A(1) and MCI No. 8 at paragraph 3A(1).

Official orders appointing replacement commission members for the cases of *United States v. al Qosi* and *United States v. al Bahlul* will be issued at a future date. *See* MCO No. 1 at Section 4A(1) and MCI No. 8 at paragraph 3A(1).

There is no classified annex to this decision.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

UNITED STATES OF AMERICA	)	D 101 B
v.	)	Commission Ruling on the Defense Motion for an Order Preserving Potential Evidence
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	7 February 2006

1. **References.** In making this ruling, the commission has considered the defense motion (D 101) and the prosecution response (D 101 A). The defense did not submit a reply to the prosecution response. The commission has also considered the transcript of the record of trial at the August 2004 and January 2006 sessions and matters filed in the PO 101 thru PO 103 series of filings. Other matters considered will be noted below.

2. **Scope of Opinion and Ruling.** The defense motion apparently requests that the Presiding Officer issue an order that all Presiding Officers, currently detailed to cases before a military commission, and the Assistant to the Presiding Officer shall preserve *in toto* all communications and documents created from some unknown period in the past to some unknown period in the future.

a. This request assumes, without further explanation, that the Presiding Officer has the authority to issue such an order. In view of the ruling below, the question of authority need not be addressed in this ruling.

b. This request assumes, without further explanation, that the writings of and the communications among and between the Presiding Officers and the Assistant are subject to disclosure without regard to privilege. In view of the ruling in 3(b)(2) below and given the failure of the defense and prosecution to brief the issue, the general issue of privilege need not and will not be fully developed in this opinion, although it is addressed in paragraph 3(b)(1) below.

3. **Findings of Fact.** The defense request is apparently predicated upon two separate and unrelated facts or items.

a. **APO Document.** The first item is that a document, attached by the defense to D 101, was provided to all defense counsel on a CD. The document was located in the Khadr folder. The commission understands that there was more than one folder on the CD and that one of them was labeled Al Bahlul.

(1) Examining the document, it appears to be a list made by the APO about certain objectives for the January trial term in the case of Khadr. There is no indication that it was seen or commented upon by the Presiding Officer in that case.

(2) Specifically, the defense speculates from the following comment in the column labeled "APO Comments":

* As soon as the initial session is completed - and without saying on the record you will have an 8-5 session, get counsel into chambers.

that there is an "attempt to force counsel into private 'conferences'".... The defense further apparently speculates that such an "attempt" involves all of the current Presiding Officers and the Assistant to the Presiding Officers. The defense offers no evidence to support such speculation and no logic which would lead from that one single comment to a conspiracy among those identified above. Nor does the defense provide any motive for such a conspiracy nor a detriment to counsel from such a conspiracy.

(3) The commission takes notice that there is a well-establish, substantial practice among military judges (The commission further notes that all of the current Presiding Officers and the Assistant to the Presiding Officers either are or have been military judges.) that while conferences in chambers are excellent for solving problems (Such conferences are called RCM 802 conferences in practice under the Manual for Courts-Martial; they are called 8-5 conferences in military commission practice.), they should not be announced on the record until after the conference has been held (Eg., see paragraph 2(s) of Attachment 1 - which was distributed on 1 May 1997.).

(4) The commission takes notice that the Assistant to the Presiding Officers is a retired Army Colonel, Judge Advocate, and Military Judge. His duties are established, *inter alia*, by Appointing Authority Memorandum of 19 August 2004 and POM 2-2.

(5) The commission finds that the nature, content, and structure of the document make clear that the document was prepared by the Assistant and intended for the eyes of the Presiding Officer. This is apparent because of the columns that indicated the Assistant's thoughts and a place for the Presiding Officer to comment. The Commission finds that one with the duties the Assistant has (See paragraph 3(a)(4) above.) would not knowingly share with counsel recommendations made to a Presiding Officer. Therefore, the commission further finds that this was an inadvertent disclosure of a document.

(6) Having reviewed the document and the duties of the Assistant, the commission finds that the document was designed to provide adjudicative advice to the Presiding Officer.

b. **Script Item.** The second item is that the trial script provided by the commission to counsel (Not just defense counsel but to all counsel at a 8-5 session on 10

January 2006.) for the session on 11 January 2006 differed from the script provided by the commission to counsel for a session in August 2006. The defense noted in its motion, that the 11 January script had the Presiding Officer addressing Mr. Al Bahlul before addressing the detailed defense counsel.

(1) Defense counsel did not state that, during the 10 January 8-5 session, the defense counsel still maintained that he was not representing Mr. Al Bahlul. However, as the defense counsel agreed during the 8-5 session, if Mr. Al Bahlul changed his mind and wanted the defense counsel, then he would represent Mr. Al Bahlul.

(2) Defense fails to point out the significance of this change in the script. Nor does defense refer to the numerous filings and other matters in the PO 102 series which address the *pro se* question - all of which came after the August 2004 session. Nor does defense refer to defense's numerous emails stating categorically that he was not representing Mr. Al Bahlul. Nor did defense object to the proposed script when given to him. And, as is evident from the record of trial, defense was not seated at the defense table when the commission was called to order and had to be ordered to sit at the table.

(3) Reviewing the entire motion, the commission is unable to discern what the script item has to do with anything in the motion.

3. Conclusions of Law:

a. **Script Item.** The commission concludes that the script item noted by the defense counsel has no relevance to any matter within this motion. Consequently, since the defense provided no argument concerning this item, no linkage to any relief requested, nor any logic train which would show anything to anyone other than that a different script was provided eighteen months after the first script was provided, the commission will not address this item.

b. **APO Document.**

(1) Neither the defense nor the prosecution addressed the privileged nature of the document in question nor the privileged nature of communications between and among Presiding Officers or between and among Presiding Officers and the Assistant. The commission concludes that adjudicative advice from the Assistant to a Presiding Officer is privileged (See 3(a)(4)-(6) above.). The commission also concludes that the inadvertent disclosure of a privileged document should have been handled by all concerned in accordance with the normal rules for privileged documents and is not, in this instance, subject to motion practice. Additionally, in view of the privileged nature of the document and that the disclosure was inadvertent and not otherwise authorized by the Presiding Officer, the commission further concludes that the inadvertent disclosure does not waive the privilege.

(2) Regardless of the issue of privilege, the commission concludes that the defense has failed to meet its burden to establish that the inadvertently disclosed

checklist from the Assistant in any way supports the defense's speculation of impropriety such that an order should be issued in this case. The defense request is not supported by the law, the facts, or any logic.

4. **Ruling:** The defense motion is denied.

/s/
Peter E. Brownback III
COL, JA
Presiding Officer

JALS-TJ-CJS 1 May 1997

MEMORANDUM FOR New Trial Judges

SUBJECT: Trial Hints

1. Having observed approximately thirty judges preside over their first court-martial or first couple of courts-martial, I have gathered a list of common mistakes. None of these is particularly grievous, but each can result in embarrassment to the new judge. These hints specifically apply to RC military judges and most are a direct result of the differences in practice between civilian courts and military courts.

2.

a. Please be seated -- Until you say these magic words, everyone else in the courtroom will remain standing. This is particularly embarrassing when you have a panel with 4 full colonels and four sergeants-major looming over you. Please be seated should be the first words out of your mouth after your rear end hits your chair.

b. The court will come to order -- Until you say these words, every thing you do or say is technically off the record. In most cases your court reporter will save you on the ROT, but the parties to the trial don't know when you are starting unless you tell them. Once you are seated, you can feel free to talk to counsel, look at your notes, get yourself situated, or whatever. Then, when you are ready to start, call the court to order.

c. Account for parties -- Parties must be accounted for at the start of every session. I just say "All parties present when the court recessed/closed are once again present in the courtroom (to include the members)." You must make sure that the record reflects that the members are either in or not in the courtroom. If someone is not present, merely say "I note that the assistant trial counsel, CPT Schmidt, is not present. Has he been excused for this session?" Other judges let the trial counsel take care of this duty; for me they are usually too slow.

d. The accused does not have to stand when talking to you -- I don't know if this is common practice in civilian courts, but it is in the military. The accused stands at the beginning and end of each session with everyone else and he stands, with counsel, when plea, finding, and sentence are entered or announced. Other than that, he can sit.

e. Follow the script -- Practicing military law is fairly simple. We have a manual and a script. Before you go to court the first time, I suggest that you read the entire thing aloud. Sounds silly, but it keeps you from being tongue-tied in court. Follow the script. Do not skip. Do not let counsel tempt you into deviating. If you have to solve a problem, put a paperclip at where you stopped in the script and proceed from there.

f. Identify who is talking or being addressed -- When you talk to a member on voir dire, or the member raises his hand to a question, or when you have any other interaction with a single member, identify him on the record. This becomes crucial when the question of what a member said or answered on group voir dire becomes part of the basis for challenge.

g. Apparently so/not -- When members answer a question as a group, whether in voir dire or at other times, you must insure that their answer is recorded. I suggest using apparently so or apparently not to indicate the answer. It's short and easy to remember.

h. Individual voir dire -- When you call a member for individual voir dire, no one has to stand up. Note for the record that COL Jones has entered the courtroom and then note that he has left the courtroom. A member who is excused is no longer a participant in the trial. When you have questioned a member on individual voir dire, do not tell him he is excused. Just tell him that he may return to the deliberation room.

i. Interrupted members or witnesses -- If you have stop the questioning of a member on voir dire or a witness on the stand, you do not need to call the member/witness back in to tell him that you will not be recalling him. For a member, just have the bailiff tell him that the court has finished with individual voir dire. With a witness, have the calling party tell the witness and you advise the panel that the witness has been dismissed.

j. Ending sessions -- In the military, a court session can end in three different ways. The end of the session which terminates the trial is adjournment. "The court is adjourned." The end of the session which allows the members or the military judge to leave the court to deliberate on findings/or sentencing is closing. "The court is closed." The end of any other session is a recess. "The court is in recess." Do not use future tenses -- "The court will be in recess." Do it right now.

k. Admitting exhibits -- Once an exhibit has been offered and you have decided to admit it, simply say "Defense Exhibit A for Identification is admitted as Defense Exhibit A." Do not say that it will be admitted. What does that mean? When will it be admitted? Either admit, do not admit, or defer ruling.

l. Member questions -- When members ask a question, make them write it on a member question sheet. Before it comes to you, both counsel will review it, note objections on it, and the reporter will mark it as an appellate exhibit. When you get it (or them), state for the record "Appellate Exhibit XVI is a question from COL Jones." Review it, decide whether you are going to ask the question or not, and then ask it. Do not mention that an objection has been made. Your ruling on the objection should be evident from the fact that you either asked or didn't ask the question. Do not let the member know that the trial or defense counsel objected to the question. Cover your decision on the objection, if any, at the

next 39a session.

m. Description -- When a witness performs an in-court action or points out a distance or does something else that will not be reflected on the record, the questioning counsel should describe the action for the record. Since this usually leads to objections, counter-objections, whining, and whatever, I describe the action myself. The sequence goes like this. "The witness has just delivered a punch with her right fist and then a side-turn and kick with her left foot. Objections to that counsel? Members, I am only setting down a description for the record. The evidence you are to consider is what you saw the witness do, not what I described for the record. Do you all understand that? Apparently so. Continue."

n. Take your time -- When you're on the bench, the record does not reflect any time lapse when you are reading the Manual or the MRE. If you want to kick back and read, do it. Everyone will wait until you are ready to go. Three minutes review of MRE 801 can save an hour later on. By the same token, if you want to have a recess while you look up law or ask another judge a question, do it. It's much better to feel confident in what you do than it is to be concerned about taking a five-minute recess.

o. Assembly -- The court is assembled when you have announced that the excused members have been excused. After this point, no one can be added or taken off without good cause. In a judge alone case, it occurs after you have approved the request for trial by military judge alone. I note that this is not what the appellate courts think, so you may want to be your own guide on this. They believe that the court is assembled when the court-members come into the courtroom for the first time.

p. Issues -- Keep a running log of matters that must be handled at the next 39a. Also indicate in your notes when prior inconsistent statements have been established. Don't rush to kick the members out to handle a matter; you might be able to wait until the next break. Just have the counsel continue on with the rest of the examination and tell them you will consider it later.

q. May we approach? - I -- No. No. No! Never let the counsel approach. Herb Green, may his memory linger, could run side-bars. Everyone else should clear the members out instead. You can get seven members on their feet and out the door before you can get four counsel, the accused, and your court reporter around the bench. Plus, you are simply inviting the members to try to overhear what you are saying. Plus more, the judge who is watching you try the case can't hear what is going on. Just say no to side-bars.

r. May we approach? - II -- Even worse is when a judge asks or allows counsel to approach the bench in a judge-alone trial. What are we trying to hide? What about the 6th Amendment? What about the poor supervising judge who has no idea what is going on. Never let counsel approach. This, of course, also goes for those

situations where counsel, in a judge-alone case, ask for an Article 39a session. No such thing.

s. RCM 802 sessions -- The Manual permits these and they are great for making sure that everyone knows what's going to happen in the courtroom. Summarize what happened at them on the record and make sure both sides agree. However, never, never, never hold an 802 session when counsel has requested one on the record. ACCA will go berserk because appellate courts believe that 802s are used to hide matters from them.

t. Silence -- Our brethren (and I use the term loosely) at ACCA and CAAF keep telling you that they want to know why you did something so that they can support you. Not. The more you say, the better chance you have to be reversed. Make required findings and issue required rulings, but never pass up the opportuity to say nothing.

u. Leaving the courtroom -- There is no reason ever no matter what the circumstances for the military judge to leave the courtroom while the members are still in the panel box. I recently learned that in some jurisdictions, judges do not remain in the courtroom for voir dire, argument, etc. It doesn't matter what your jurisdiction does, DO NOT LEAVE THE COURTROOM WHILE THE PANEL IS IN THE PANEL BOX. I can not think of an easier way to have a case reversed.

v. Help -- The foremost expert on judicial ethics in the Army, COL Gary Holland, tells me that any discussions you have with other judges need not be revealed to anyone. Further, you don't even have to tell anyone that you've asked another judge a question. I take full advantage of this provision in almost every case I try. No matter how routine the issue or the sentencing decision, if I have an opportunity, I'll get on autovon and call another judge. Why not? Doesn't hurt and you get another look at the situation. No one is saying that you're not making your own decision. You are. However, you do get a second opinion, and in military law that's always a good thing to get.

3. You will develop your own techniques. These are just some of mine. I would suggest that you stick with them until you feel comfortable in the courtroom.

PETER B. BROWNBACK III
COL, JA
Chief Circuit Judge

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Tuesday, February 07, 2006 9:35 AM
To: [redacted]
Subject: Voir Dire and Challenges for cause - US v. al Bahlul
Attachments: RE 153 - al Bahul.pdf; RE 138 - al Bahul.pdf

1. Counsel will be given an opportunity to voir dire the Presiding Officer and will be prepared to do so at the February trial term.

2. Though previously provided to counsel attached is RE 138 which contains previous voir dire materials.
3. Counsel may submit additional written questions for the Presiding Officer, if they so choose, no later than 16 February 2006. Counsel who fail to submit additional questions may forfeit their opportunity to conduct the type of voir dire of the Presiding Officer they plan. No party will be denied meaningful voir dire, but the voir dire process will be as efficient as possible. Questions submitted to the Presiding Officer will be in the form of a Word document attached to an email.

4. The standard for challenges is contained in MCI #8, which refers to the Appointing Authority's Memorandum of 19 October 2004 (RE 153). I have also attached that RE for your convenience. Any motion concerning the standard for challenge must be made no later than 21 February 2006. If such a motion is made, the Presiding Officer will consider the motion prior to ruling on any possible challenge.

5. Counsel are advised to consider the provisions of MCO #1, paragraph 4A(3) and MCI #8, paragraph 3A when preparing for and conducting voir dire.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

<<RE 153 - al Bahul.pdf>> <<RE 138 - al Bahul.pdf>>

UNITED STATES OF AMERICA

v.

Ali Hamza al Bahlul

Defense Preliminary Voir Dire of the Presiding Officer

PRESIDING OFFICER RESPONSES:

NR - Not Relevant to or beyond scope of Voir Dire - see MCO #1, 3A(5)(a) and MCI #8, 3A.

RE 138 - Information contained in RE 138.

A. Additional Biographical Information

1. What did your parents do professionally? **NR.**

2. How many siblings do you have and what are thier professions? **NR.**

3. Please discuss your wife's career including the jobs she had on active duty and what she does now. Is there anything that has happened in your or your wife's lives, personally or professionally, that a reasonable person sitting in Mr. al Bahlul's position would want to know about? **RE 138 for relevant material. Otherwise, NR.**

4. Please identify the names of your children and what they do for professions. **NR.** Is there anything that has happened in your children or grandchildren's lives, personally or professionally, that a reasonable person sitting in Mr. al Bahlul's position would want to know about? **No.**

5. Have any of the persons discussed above, or yourself, contributed money to any political party or campaign? If so what candidate? **NR to others, No for myself.**

B. Current Military Assignment

6. Where do you currently live? **NR.**

7. Where are you currently assigned? **RE 138.**

8. Who is your current supervisor? **I have none. See RE 138.**

9. What do your military duties consist of? **RE 138 and Commission Law.**

10. Have you had continuing legal education since being recalled? If so, please provide the names of courses you have attended. **TJAGSA Law of War Course - Jan-Feb 2005.**

11. In which states are you licensed to practice law? **Virginia.** Are you an active member in all of those states? **No.**

12. Are you aware of anything that would cause you to be, or others to perceive you as being, biased or unable to be an impartial member of this commission? **No.**

13. Please provide a copy of all your officer evaluation reports. **NR.**

14. Please provide a copy of any criminal or disciplinary investigations, if any. **None.**

15. Are you aware of any complaints that have been filed against you? **No.** If so, please provide copies of the complaints and the resulting actions. **None.**

16. Please provide a copy of any letters of reprimand, letters of counseling or any other administrative action. **There are none - see 17 below.**

17. Please list any and all administrative actions, even if such administrative paperwork have been removed from your records or never recorded in his files. **There are none - assuming this refers to non-favorable actions.**

18. Have you received any military or disciplinary action, such as non-judicial punishment? **No.** If so, what were the charges and what was the result of such action?

C. Retirement - 2004

19. Between 1999 and being recalled, did you practice law? **No.**

20. Between those same periods, did you attend any legal conferences or CLE? **No.**

21. Please advise what jobs you had during that period, if any, and provide detailed descriptions of the duties performed. Also, how did your employment cease? **RE 138.**

D. Military Commissions

22. Have you ever spoken with any presiding officer about the law of war or military commissions? **Yes.** Please advise which PO (or Mr. Hodges) you spoke with and the substance of your conversations. **NR.**

23. Have you ever spoken with anyone at the JAG School about the law of war or military commissions? **TJAGSA Instructors during the Law of War Course.**

24. Have you ever stated an opinion to anyone about the legality of the commission process? **NR.**

25. Other than to counsel in the cases, have you ever stated an opinion to anyone about the procedures to be used in the military commissions? **NR.**

26. Please forward all emails that you received from anyone (other than your family) regarding your nomination, selection, and role as a Presiding Officer (to include superiors, co-workers, other military service

members, other commission members, Office of Military Commission personnel, and personnel from the Office of SECDEF). **NR.**

27. How was Mr. Keith Hodges selected and appointed to be your assistant? Please provide any paperwork related to his appointment or hiring. **RE 138.**

28. Please describe any prior professional or personal relationship you had with Mr. Hodges. **RE 138.**

29. Mr. Hodges is apparently employed by DHS, as an instructor at the Law Enforcement Training Center. Do you believe that his employment with DHS presents a conflict with his duties as assistant to the Presiding Officer? **No.** Why or why not?

30. In a 28 Jul 04 memorandum to former detailed defense counsel, you stated that you "have authority to order those things which I order done." What did you mean by that statement? **RE 138 and the memorandum.**

31. Do you believe the other commission members have an equal voice with respect to issues of law? **Not at this time.** Why? **RE 138, PMO, MCO #1, and MCI #8; however, since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

32. Please describe how you envision your role in relation to the role of the other commission members, especially in relation to what you plan to do regarding questions of law. **Since this involves an issue which may come**

before the Commission, I am open to proper argument to convince me of the correct answer.

33. What authority do you believe you possess as Presiding Officer that differs from the authority of the other commission members? **See 31 above.**

34. In establishing these commissions, the President made the commission "triers of both fact and law." What does that mean to you? **RE 138. Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

35. The President, SECDEF, and the DOD General Counsel issued the orders and instructions that control these proceedings. As a commission member, do you believe that you have the authority to declare these orders and instructions to be unlawful, if you believe them to be unlawful? **RE 138. Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

36. Do you believe you have the authority to modify the orders and instructions to comply with other applicable law, if you believe the orders and instructions are inconsistent with other applicable law? **RE 138. Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

37. To where will you look to determine the applicable law? **RE 138. Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

38. Mr. Altenburg has issued "instructions" and "rulings" and "decisions" regarding various aspects of the military commissions. Are you bound by his rulings? Is the commission, sitting as a group, bound by those decisions? **RE 138. Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

39. In your professional life, have you ever been involved in the trial regarding law of war violations? **No.**

40. Who made the actual decision to make you a presiding officer? **RE 138.**

41. What criteria were used to make this decision? **RE 138.**

42. What training is there for the job, and by whom? **OJT.**

43. Who can remove you from this role? **At a minimum, the Appointing Authority, the Secretary of Defense, and the President. Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

E. Legal Training

44. What legal training have you had with respect to International Human Rights law and the Law of War? Please provide details below. **Recently, see 10 above.**

45. What legal training have you had with respect to the Military Commissions? Please provide details below, including the names and addresses of all those who presented on the commissions, and a synopsis of what they said. **See 42 above.**

46. What opinions have you expressed outside the forum of the military commissions concerning the legitimacy of the commissions and their rules? Please identify each occasion that such a comment has been made, as precise a rendition of what he said as possible, and the name and address of all those present when the comment was made. **NR.**

47. Have you given presentations or been published since 2000? Please provide the topics and timeframes. **No publications. Presentations to USA TDS in 2003, TJAGSA Crim Law Update in 2002, TCAP in 2002, ABA Section on Military Law in 2001, Military Judges' Course in 2005. None of these presentations involved any discussion of the Commissions.**

F. Use of Evidence Derived from Torture

48. Do you personally believe evidence obtained through torture or other involuntary means should be admissible before military commissions? **NR. Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

49. Do you believe the United States has the burden to show that evidence was gathered through non-coercive means? **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

50. Is evidence gathered through torture inadmissible, or does the fact that the evidence was obtained involuntarily go to the weight given? **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

51. Do you believe that how evidence is gathered, including through torture or other coercive means, is relevant? **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

52. Assuming evidence is offered against Mr. al Bahlul that was gained through torture what do you intend to argue to the other members regarding how the evidence can be used? **I do not intend to present any argument to the members.**

53. Do you believe you have a responsibility to help bring the perpetrators of torture against Mr. al Bahlul to justice, be they subject to U.S. civilian or military justice, or to international law? **NR.**

G. Opinions regarding other terrorism cases

54. The Administration took the position that Guantanamo Bay detainees had no access to the Federal Courts. The Supreme Court, in Rasul v. Bush ruled otherwise. How do you feel about both the Administration's position and the Court's ruling? **NR. Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

55. What role do you believe the judicial branch should have in "the war on terror?" **I don't know what you mean by the "judicial branch." If you mean a Presiding Officer, since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

56. Have you read the Quirin decision? What do you believe it stands for? **Yes. Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

57. Is there anything else about any opinion you have read that you feel should, in good faith, be revealed? **No.**

H. Experience as a Military Lawyer

58. What kinds of cases did you prosecute as a Trial Counsel? **Numerous.**

59. What kinds of cases did you defend as a defense counsel? **Numerous.**

60. What experiences did have in these roles that a reasonable person would think an accused person would want to know? **Standard TC/DC.**

61. Please explain in detail what your duties were as Legal Advisor to USAJFK Center for Special Warfare and Joint Special Operations Command. **NR.**

62. What experiences did you have in these roles that a reasonable person would think an accused person would want to know? **Nothing.**

63. Please explain in detail your duties and roles as Director of Legal Operations, JSOC and SJA 22d SUPCOM. **NR.**

64. What experience did you have in these roles that a reasonable person would think an accused person would want to know? **Nothing.**

I. Experience as a Military Judge

65. Please provide a complete listing of all cases where you were the military judge. **NR.**

66. Of the cases in which you sat as military judge, how many involved someone who was not a member of the U.S. armed services? **None.**

67. Of the cases in which you sat as military judge alone, involving U.S. armed service personnel, how many, if any, resulted in a finding of not-guilty? I **do not have that data readily available.**

68. Of the cases in which you presided how many involved serious felony charges that could be considered to rise to the nature and seriousness of the current charges before the commission? **Numerous.**

69. What experience did you have in this role that a reasonable person would think an accused person would want to know? **Do not understand the question.**

J. President Bush

70. President Bush and others in the Administration have made many inflammatory comments, such as: "These are people picked up off the battlefield in Afghanistan. They weren't wearing uniforms ... but they were there to kill." Please explain how comments like the one above should not be construed as an attempt to predetermine an outcome. **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

71. The President makes the implicit claim that terrorists don't deserve protections of due process. In his own words: "We must not let foreign enemies use the forums of liberty to destroy liberty itself." Please discuss whether you believe Mr. al Bahlul has "due process rights" and from where you believe those

rights come. **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

K. Training for This Case

72. What training have you had for participating in the role of Presiding Officer? **See 42 and 45 above.**

73. Have you sought any opinion, advice, guidance on the law of war or military commissions with any individual or expert since becoming a presiding officer? Please provide details. **NR.**

74. Have you attended any conferences or meetings, addressing policy and/or procedures on how to conduct the military commissions and the roles and duties of the PO? If so provide details of any such meeting, and provide all the written materials that were distributed at such a meeting. **NR.**

75. In that training for participating in the role of Presiding Officer, please name everyone who has given presentations. **NR.**

76. What books or articles have you read since first being told that you were being considered for the role of presiding officer? Only provide those books or articles that address military or legal matters. **NR.**

L. Involvement with Prior Prosecutors

In recent publicized reports about the tribunals, it has become clear that at least three prosecutors have resigned from the process because they viewed the process as "rigged" to convict.

77. Have you read articles or seen the email traffic mentioned above? **One or more as part of a filing in another case. I do not know the truth of those assertions, and what I saw was redacted.**

78. One of the more striking statements in the prosecutors' messages was an assertion that the chief prosecutor had told his subordinates that the members of the military commission that would try the first four defendants *would be "handpicked" to ensure that all would be convicted."* Would you agree that the potential issue of "handpicking" members is one that should be explored? Why or why not? **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

79. Do you know of any evidence either supporting or refuting this claim? **No.**

80. That same officer, Capt. John Carr of the Air Force, also said in his message that he had been told that any exculpatory evidence - information that could help the detainees mount a defense in their cases - would exist in the 10 percent of documents being withheld by the Central Intelligence Agency. Do you believe the prosecutors in this case have an obligation to turn over exculpatory evidence not only that is in their possession, but all evidence that is in the

possession of the "Government and its agents?" **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer. See PO 104.**

81. Do you believe the existence of exculpatory information that may or may not be in the actual hands of the prosecutor is a topic that the defense has a right to explore and have access to? **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer. See PO 104.**

82. Captain Carr's e-mail message also said that evidence showing Mr. al Bahlul had been brutalized and tortured had been "lost" and that other evidence on the same issue had been withheld. Do you believe that information showing the destruction of this and other evidence is relevant? **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

83. Do you believe Capt. Carr and others in the prosecutor's office at the time should be questioned on the record, before this commission, to determine whether there was destruction and withholding of evidence? **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

84. The second officer, Maj. Robert Preston, also of the Air Force, said in a March 11, 2004, message to another senior officer in the prosecutor's office that he could not in good conscience write a legal motion saying the proceedings would be "full and fair" when he knew they would not be. Do you agree that Mr. al Bahlul has a right to present evidence showing that his trial is not "full and fair?" **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

85. Do you believe that steps have been made to mislead the public on the true culpability of the accused prisoners in these cases? **No reason to believe or disbelieve.**

86. Are you aware of the NY Times article of 1 August 2005, where it was reported that "General Altenburg selected the commission members, including the presiding officer, Col. Peter S. Brownback III, a longtime close friend of his. Defense lawyers objected to the presence of Colonel Brownback and some other officers, saying they had serious conflicts of interest. General Altenburg removed some of the other officers but allowed Colonel Brownback to remain?" Do you agree that the public could view your relationship with Mr. Altenburg as creating an appearance of a conflict of interest? Why or why not? I **am not aware of the article. See RE 138. Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

87. Have you taken steps to investigate the truthfulness of these allegations? Why or why not? **I do not understand the question or the antecedent thereto.**

88. What personal knowledge do you have that would support or refute these allegations? **I do not understand the question or the antecedent thereto.**

89. Will you ensure that these and other former prosecutors are made available to discuss their allegations? **Since this involves an issue which may come before the Commission, I am open to proper argument to convince me of the correct answer.**

M. Involvement with Others

90. Have you had any dealings with any other member of the commission? **No, other than directing that certain instructions be given to them in writing -- all of which are filings and REs.**

91. Please provide details of any relationship (of any kind) that you have with any other presiding officer. **NR.**

92. Is there anything else you should reveal on the subject of the other commissions? **No.**

93. Please identify any relationship at all that you have with any member of the Review Panel. **None.**

TOM FLEENER
MAJ, JA
Defense Counsel

Index of Current POMs – February 16, 2006

See also: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

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16	Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses	February 16, 2006

* - Also a joint document issued with the Chief Clerk for Military Commissions.

THE IOWA STATE BAR ASSOCIATION
[redacted] Des Moines, Iowa 50309-4180
[redacted]
[redacted]ID ethics@iowabar.org
Chair Ethics and Practice Guidelines Committee

February 24, 2006

Maj. Tom Fleener
Office of Military Commissions
Office of the Chief Defense Counsel
1600 Defense Pentagon, Rm. 3B688
Washington, DC 20301

Dear Maj. Fleener:

Summary

As an Army Reserve JAG Officer and a Member of the Iowa Bar, you have requested our opinion as to whether you can ethically comply with a military court order assigning you to undertake the defense of one who does not wish to be represented. The client's rejection of your service is not personal to you but an assertion of his demand to represent himself. The rules of the tribunal prohibit self representation. Our answer is yes.

Introduction

This matter arises from proceedings before a Military Commission established pursuant to a Military Order of November 13, 2001, issued by President George W. Bush as Commander in Chief of the Armed Forces of the United States, as per the authority granted by the Congressional Joint Resolution on the Authorization for Use of Military Force of September 14, 2001, effective September 18, 2001 (Public Law 107-40, 115 Stat. 224), and Sections 821 and 836 of Title X, *United States Code*. The Military Order gives the President the right to identify individuals who are not citizens of the United States to be subject to the provisions of the Order. Such designation must occur in writing and indicate that:

1) there is reason to believe that such individual, at the relevant times,

   i) is or was a member of the organization known as al Qaida,

   ii) has engaged in, aided or abetted or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused,

threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy, or

iii) has knowingly harbored one or more individuals described in sub-paragraphs i) or ii) of Sub-section 2(a)(1) of this Order; and

2) it is in the interest of the United States that such individual be subject to this Order.

Section 4(a) of the aforesaid Military Order provides:

> "Any individual subject to this Order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

On July 3, 2003 President Bush entered a written finding that Ali Hamza Ahmad Sulayman al-Bahlul should be subject to the Military Order of November 13, 2001. Accordingly, proceedings were instituted before a Military Commission against al-Bahlul charging him with conspiracy, as defined by the aforesaid Military Order. The charge claims that from late 1999 through December, 2001 al-Bahlul was personally assigned by Usama bin Laden to work in the al Qaida media office and in that capacity created several instructional and motivational recruiting tapes on behalf of al Qaida. At his initial appearance before the Military Commission, al-Bahlul stated that he was 36-years-of-age with 16 years of formal education and has a "large amount of knowledge" about American culture. He speaks English but at the proceedings requested the assistance of a translator. He stated that he has some understanding of the law, having read legal matters and books and a "very good understanding" of the charges against him. At the hearing he challenged the structure of the Military Commission stating: "I don't think it's fair that the evidence would not be presented and the accused cannot defend himself without seeing the evidence for himself or even through an attorney," referencing the Commission's rule that certain classified evidence can only be examined by "detailed defense counsel," meaning defense counsel assigned by the Office of Chief Defense Counsel of the Office of Military Commissions, as compared to a civilian defense counsel.

At the hearing al-Bahlul rejected the services of detailed defense counsel and requested the right to represent himself before the Commission. The Military Order of November 13, 2001, while silent regarding the right to self-representation, grants in Section 6(a) to the Secretary of Defense the authority to issue orders and regulations to implement the Order. On August 31, 2005 Secretary of Defense Donald H. Rumsfeld issued Military Commission Order No. 1 defining "Procedures for Trial by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism." Paragraph 4 provides that:

> "The accused must be represented at all relevant times by detailed defense counsel."

Pursuant to al-Bahlul's request for self-representation, unsuccessful litigation ensued before the Military Commission to amend Military Commission Order No. 1. Presumably that issue has been preserved for further review.

With that background in mind, we now turn to the specific questions presented by Maj. Fleener.

No. 1.

> May a military lawyer obey the order of a military tribunal to represent a person charged with criminal offenses before the tribunal, when (1) that person has declined representation by counsel, (2) the tribunal has made no particularized finding that the person has been or will be disruptive to the tribunal or is mentally or physically incapable of representing himself, (3) the tribunal has made no finding that appointing standby counsel would be inadequate to protect against disruption of the proceedings, and (4) the tribunal's decision to deny the person's claim to represent himself, or to choose his own counsel is based on a categorical assertion that national security and logistical concerns prohibit both courses, without regard to whether reasonable, less-restrictive means may be available?

Opinion No. 1: Yes

The answer is "yes." The Committee notes that the proceedings in question do not involve a person "charged with criminal offenses." In this situation the criminal laws of the United States regarding substance and procedure are inapplicable. The Military Commission and its process are the creation of the

Executive Branch, by operation of *United States Constitution*, Article II, Section 2, in that the President is the Commander in Chief of the Armed Forces of the United States, and supported by the Congressional Joint Resolution of September 14, 2001 regarding the use of military force. As such the Military Commission and its process, including Section 4 of the Military Commission Order No. 1, of August 31, 2005, are entitled to a presumption of Constitutional validity. Whether the process withstands Constitutional attack is not the province of this Committee, nor is it material in answering the ethical question posed by Maj. Fleener. Consequently items number two, three and four in Maj. Fleener's first question are not relevant for our purposes.

The heart of the ethical question is whether Maj. Fleener can purport to act on behalf of al-Bahlul when the accused expressly declines the representation--not because of a complaint against the lawyer but as a result of an objection to the rules of the tribunal. American lawyers are considered officers of the Court with regard to any tribunal before whom they appear.[1] Consequently Maj. Fleener owes a duty of loyalty to both al-Bahlul and the Military Commission. The fact that al-Bahlul, in opposition to Section 4, Military Commission Order No. 1 of August 31, 2005, wishes to self-represent does not *ipso facto* relieve Maj. Fleener of his obligation to the tribunal. For, if it did, disgruntled clients could routinely throw the court system into disarray and ultimately pervert the course of justice. For example, in Ethics Opinion 75-01 the Committee recognized that a defense attorney has the affirmative ethical duty to inform the court as to a procedural error notwithstanding the fact that the defendant would receive a reversal upon appeal. In these circumstances the duty of the attorney as an officer of the court takes precedence. Recognizing their role as officer of the court, attorneys are often called upon to act for clients for whom the law does not allow self representation. See, for example Estate of Leonard, ex rel., Palmer v. Swift, 656 NW2d 132 (Iowa 2003), regarding the attorney's role as guardian ad litem and officer of the court.

No greater authority than Sir William Blackstone in his Commentaries recognized the primary duty that a lawyer owes to the court before whom the lawyer appears. As stated by Reynoldson, C.J., Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Humphrey, 377 NW2d 643, 648 (Iowa,1985):

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[1]This is in contrast to the professional rules applicable to the Bar of England and Wales. Unlike American attorneys and English Solicitors, Barristers are not officers of the court and can only act upon "instructions" from the lay client.

> From the early history of the common law to this day, lawyers have been inextricably linked in the minds of persons generally, as well as in fact, to the functions of the courts and the adjudication process. Blackstone in the middle of the 18th century wrote that attorneys were "admitted to the execution of their office by the superior courts of Westminster Hall, and are in all points officers of the respective courts of which they are admitted."

Complying with the tribunal's order to represent al-Bahlul's interest is discharging your duty as an officer of the court. If and when al-Bahlul should accept your representation, different duties apply. By issuing the instructions--with the expectation that they be carried out--al-Bahlul would first have to recognize that you are his counsel and he has a right to instruct you. In that case, your situation is no different than in any other form of representation: You must comply with your client's instructions consistent with the rules of the tribunal. See Annotation, *Attorney's right to institute or maintain appeal where client refuses to do so.* 91 ALR 2d 618; Restatement (Third) of the Law Governing Lawyers §§ 21 (2000).

We are of the opinion that as an officer of the court, Maj. Fleener has an obligation to act in accordance with the rules of the tribunal regarding the protection of al-Bahlul's legal interests before the tribunal notwithstanding his objection thereto. Consistent with that duty, Maj. Fleener has a corresponding obligation to make whatever record is necessary to protect al-Bahlul's objection to the rule.

We are of the opinion that as an officer of the court, Maj. Fleener has an obligation to act in accordance with the rules of the tribunal and accept the representation of al-Bahlul notwithstanding his objection thereto. Consistent with that duty, Maj. Fleener has a corresponding obligation to make whatever record is necessary to protect al-Bahlul's objection to the rule.

No. 2.

> May a military lawyer obey the order of a military tribunal to represent a person before a military commission, when the rules of the tribunal depart significantly from customary, domestic and international standards for due process? More specifically, the rules of the tribunal permit (1) non-disruptive defendants to be excluded from their own commission proceedings and testimonial hearsay admitted, in contrast to the confrontation clause, (2) statements obtained through torture or other coercive

means to be admitted into evidence, (3) the admission of all evidence that is "probative to a reasonable person," regardless of the prejudicial effect such evidence may have, (4) the death penalty to be imposed with as few as seven panel members and no requirement that aggravating factors be charged or proven, and (5) the accused's trial to be delayed indefinitely.

Opinion No. 2: Yes

Counsel is frequently called upon to discern Constitutional deficits in substance and procedure and raise the issue before the tribunal, where it can either be remedied or preserved for appeal. The Committee notes that detailed defense counsel has done an admirable job of doing so in this case. If by some perceived ethical prohibition counsel could elect not to do so, Constitutional defects would neither be identified nor cured. Indeed, vigilant defense counsel stands as a gatekeeper to ensure that the client's rights are fully protected.

No. 3

Does either your answer to question Nos. 1 or 2 change if the conditions outlined in both questions are applicable to the proceeding?

Opinion No. 3: Declined

As presently worded the question is not sufficiently stated so as to call for an answer. Counsel is referred to Opinions 1 and 2 above for guidance.

[redacted]
Chair,
Ethics and Practice Guidelines Committee
Iowa State Bar Association

NC/mjg

AL BAHLUL
REVIEW EXHIBIT 159

Review Exhibit (RE) 159 is curriculum vitae of Translators No. 3 and 4.

RE 159 consists of 4 pages.

Translators No. 3 and 4 have requested, and the Presiding Officer has determined that that RE 159 not be released on the Department of Defense Public Affairs web site. In this instance Translators No. 3 and 4's rights to personal privacy outweighs the public interest in this information.

RE 159 was released to the parties in *United States v. al Bahlul*, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 159.

//signed//

M. Harvey
Chief Clerk of Military Commissions

Hodges, Keith H. CTR OMC

From: Hodges, Keith H. CTR OMC
Sent: Tuesday, February 28, 2006 4:21 PM
To: [redacted]Brownback, Peter E. COL OMC; Fleener, Tom A MAJ OMC
Cc: Davis, Morris D Col OMC; [redacted]Sullivan, Dwight H Col OMC
Subject: D 2: al Bahlul Motion to Continue

The Presiding Officer has directed that:

1. The motion filed in the first email in this thread be placed on the filings inventory as D 102.

2. The prosecution shall obtain that statement or that affidavit, or if not available, that witness that establishes the information provided below and be prepared to have the document or witness available at the session of the Commission on 1 March 2006.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[redacted]

-----Original Message-----
From: [redacted]Lt Col OMC
Sent: Tuesday, February 28, 2006 3:44 PM
To: Harvey, [redacted]CTR OMC; Hodges, Keith H. CTR OMC; Brownback, Peter E. COL OMC; Fleener, Tom A MAJ OMC
Cc: Davis, Morris D Col OMC; [redacted]MAJ OMC; [redacted]LCDR OMC; [redacted]LT OMC; [redacted] TSgt OMC
Subject: RE: al Bahlul Motion to Continue

ALCON -

In response to the defense motion for continuance due to al Bahlul allegedly having tuberculosis, I called the JTF Deputy SJA, LTC [redacted] (sp?) to get directed to the appropriate camp medical personnel and find out what, if anything, could be done concerning al Bahlul's alleged condition. I was informed that al Bahlul ***does not*** have tuberculosis, but rather was tested for it. He apparently tested negative. I asked to be provided a statement from the appropriate medical official to confirm this. When I have that I will formally respond to the defense motion. However, due to the immediacy of the motion and the scheduled hearing, I felt this interim response was necessary and appropriate.

V/R

Lt Co[redacted]USAFR
Prosecutor

-----Original Message-----
From: Harvey, Mark W CTR OMC
Sent: Tuesday, February 28, 2006 3:06 PM
To: Hodges, Keith H. CTR OMC; Brownback, Peter E. COL OMC; Fleener, Tom A MAJ OMC; [redacted]Lt Col OMC
Subject: al Bahlul Motion to Continue

<< File: al Bahlul Defense Motion to Continue (28 Feb 06) (2 pages).pdf >>

UNITED STATES OF AMERICA v. ALI HAMZA AL BAHLUL	**Defense Motion** to Continue the 01 March 2006 Hearing Due to Infectious Disease 28 February 2006

1. This motion is filed by the Defense in the case of the *United States v. Ali Hamza al Bahlul.*

2. **Relief Requested:** The Defense moves to continue the hearing scheduled for 01 March 2006 in this case on the ground that Mr. al Bahlul has tuberculosis.

3. **Facts:**

a. Earlier today, detailed defense counsel arrived at Camp Echo to meet with Mr. al Bahlul. Detailed defense counsel was informed that Mr. al Bahlul has tuberculosis – a highly infectious disease. All guards who were responsible for Mr. al Bahlul's transportation and needs were wearing surgical masks and gloves. Mr. al Bahlul himself was wearing a surgical mask to prevent transmission of tuberculosis, and detailed defense counsel was informed that any personnel meeting with Mr. al Bahlul must wear a surgical mask.

b. Tuberculosis is a highly contagious, serious disease that can be fatal if not treated properly. Tuberculosis is transmitted from person to person through the air. Dep't of Health and Human Svcs., Centers for Disease Control and Prevention, Questions and Answers About TB, *available at* http://www.cdc.gov/nchstp/tb/faqs/qa_introduction.htm#Intro1.

4. **Argument:**

The hearing currently scheduled for 01 March 2006 should be continued so that Mr. al Bahlul may obtain appropriate medical care and so that all essential and non-essential personnel

scheduled to attend the hearing will be protected from transmission of a highly contagious disease.

In order for Mr. al Bahlul to meaningfully participate in his own defense his tuberculosis infection must be treated. Moreover, the protective measures necessary to minimize transmission of tuberculosis from Mr. al Bahlul to others will interfere with his ability to consult with his counsel.

Further, in order to protect the Presiding Officer, the commission members, defense and prosecution counsel, and all other commission personnel as well as all approved spectators, the hearing must be continued until such time as Mr. al Bahlul is no longer contagious. If Mr. al Bahlul is brought to the commission building – a requirement if the proceedings is even to purport to be fair – he will put all other personnel at risk of catching a serious infectious disease.

Detailed defense counsel was only informed today that Mr. al Bahlul has tuberculosis. Immediately upon being informed of the situation, detailed defense counsel filed the instant motion.

In making this motion, or any other motion, Mr. al Bahlul does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

By: _____
TOM FLEENER
Major, U.S. Army Reserves
Detailed Defense Counsel

Hodges, Keith H. CTR OMC

From: Hodges, Keith H. CTR OMC
Sent: Tuesday, February 28, 2006 4:25 PM
To: Harvey, [redacted]W CTR OMC; Brownback, Peter E. COL OMC; Fleener, Tom A MAJ OMC; [redacted]Lt Col OMC; Davis, Morris D Col OMC; Sullivan, Dwight H Col OMC
Cc: Hodges, Keith H. CTR OMC
Subject: D 103: al Bahlul Motion to Quash

The Presiding Officer has directed that:

1. The Prosecution shall use its best efforts to respond to the motion and serve the response upon the Defense as soon as it is able. As it appears that MAJ Fleener is not up on email, please also email-serve Col Sullivan and deliver a paper copy to the Defense.

2. Both parties be prepared to litigate this motion at the next session of the Commission on 1 March 2006.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[redacted]

-----Original Message-----
From: Harvey, [redacted]CTR OMC
Sent: Tuesday, February 28, 2006 3:02 PM
To: Hodges, Keith H. CTR OMC; Brownback, Peter E. COL OMC; Fleener, Tom A MAJ OMC; [redacted]Lt Col OMC
Subject: al Bahlul Motion to Quash

<< File: al Bahlul Defense Motion to Quash (28 Feb 06) (5 pages).pdf >>

UNITED STATES OF AMERICA v. ALI HAMZA AL BAHLUL	**Defense Amended Motion** to Quash the Order Directing a 28 February 2006 Hearing and Schedule an Immediate Hearing with All Commission Members 28 February 2006

1. The Defense raised this objection during the initial session on 11 January, 2006. Defense did not file a written motion within the specified timeline because detailed military counsel was waiting for an opinion from the Iowa Bar giving guidance on the actions counsel could take in respect to filings in this case. On the afternoon of Friday, 24 Febuary, counsel received the opinion from the Iowa bar. Counsel then spoke with the Bar to get further guidance and spoke with his private attorney. On Monday, 27 February, counsel spent the entire day attempting to get to GTMO. On the following morning, today 28 February, counsel filed the motion.

2. **Relief Requested**: The Defense moves to quash the Order scheduling the 28 February 2006 hearing in this case on the ground that under the President's Military Order of 13 November 2001, the Presiding Officer has no jurisdiction to sit alone. Defense further requests an immediate hearing with all commission members present to determine the issue of Mr. al Bahlul's request to represent himself.

3. **Burdens of Proof and Persuasion**: As this is a jurisdictional challenge, once it is raised, the burden shifts to the Prosecution to establish jurisdiction by a preponderance of the evidence. *See United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002) ("Jurisdiction is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence").

4. **Facts**:

1. The President's Military Order of 13 November 2001 provides that the orders and regulations governing military commissions "shall at a minimum provide for . . . a full and fair trial, with the military commission sitting as the *triers* of both fact and law." President's Military Order at § 4(c), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added) [hereinafter PMO or President's Military Order].

2. On 11 January 2006, the Presiding Officer, acting alone, denied Mr. al Bahlul's request to self-represent and denied detailed military counsel's request to withdraw.

5. **Argument:**

The President's Military Order of 13 November 2001 provides that the orders and regulations governing military commissions "shall at a minimum provide for . . . a full and fair trial, with the military commission sitting as the *triers* of both fact and law." PMO at § 4(c), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added). This language clearly provides that the entire military commission shall rule on matters of law. The only exception that the President's Military Order makes to this general rule is that "the presiding officer of the military commission may make rulings on the admissibility of evidence," subject to the possibility of being overruled by the entire panel. *See id.* at § 4(c)(3). Even that section clearly contemplates that all commission members will be present when the Presiding Officer rules on the admissibility of evidence, since it refers to the possibility of a member requesting to overturn the Presiding Officer's decision "at the time the presiding officer renders that opinion." *Id.*

Significantly, military commissions are common law tribunals and are limited to "use[s] . . . contemplated by the common law of war." *In re Yamashita*, 327 U.S. 1, 20 (1946). In the entire history of military commissions' operation in the United States, there is no known case of a commission proceeding with only one of its several appointed members. While historically a

one-person military commission could properly be convened,[1] that is a different scenario than proceeding with only one of seven detailed members. Such a departure from historic practice is inconsistent with the common law and inconsistent with the President's Military Order.

While Military Commission Order No. 1 provides that the Presiding Officer may conduct hearings outside the presence of the other members, *see* Military Commission Order No. 1 at ¶ 4.A(5) (Aug. 31, 2005) [hereinafter MCO No. 1], that provision is invalid. As MCO No. 1 also provides, "In the event of any inconsistency between the President's Military Order and this Order, including any supplementary regulations or instructions issued under Section 7(A), the provisions of the President's Military Order shall govern." *Id.* at ¶ 7.B. MCO No. 1's authorization for the Presiding Officer to hold hearings by himself is fatally inconsistent with the President's Military Order.

The President's Military Order provides that implementing "[o]rders and regulations . . . shall at a minimum provide for . . . a full and fair trial, with the military commission sitting as the *triers* of both fact and law." PMO at § 4(c) (emphasis added). The plain meaning of this provision is that, on each Commission, there are to be multiple "triers" of both fact and law. At a minimum, more than one member must evaluate legal, as well as factual, questions. The best construction is that *all* members of the commission must be involved in all determinations of both fact and law. This requirement is inconsistent with the notion that the Presiding Officer could hold a session to determine the law in the absence of any other military commission member. Indeed, the Presiding Officer himself has already acknowledged this requirement, instructing the Commission in the case of United States v. Hicks: "As the only lawyer appointed to the commission, I will instruct you on the law. *However,* the President has decided that the

[1] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENT: VOLUME 2, 835 (2nd rev & enl ed. 1920) (1895) (In the Commission Library).

commission will decide all questions of law and fact." Commission Hearing, *United States v. Hicks*, August 24, 2004, Record at 114 (emphasis added). The President's order governing the Commission process has not changed since that time. The President *still* requires that the full commission decide all questions of both law and fact.

Similarly, the Legal Advisor to the Appointing Authority has previously emphasized:

> The President's Military Order (PMO) of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," requires a full and fair trial, with the military commission sitting as the triers of both fact and law." *See Section 4(c)(2)*. The PMO identifies only one instance in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer's opinion by a majority of the Commission. *See Section 4(c)(3)*.

Legal Advisor to the Appointing Authority for Military Commissions, Memorandum for the Presiding Officer, SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions (August 11, 2004) [Attachment 1].

As the plain meaning of the President's Military Order dictates, and as both the Presiding Officer and the Legal Advisor to the Appointing Authority have already recognized, all the members of the military commission are "triers of both fact and law." The Presiding Officer has no authority to act on his own. Indeed, to do so would violate the President's clear intent when he used the plural "triers" to refer to the decision-making authority for legal issues. Accordingly, the Presiding Officer has no jurisdiction to hold a session without the other commission members being present. The order docketing a hearing without the other members must be rescinded.

The session on 1 March 2006 with the Presiding Officer sitting alone must be continued to allow all the members of the commission to decide whether Mr. al Bahlul should be allowed to self-represent. Choice of counsel and the role of counsel is an issue that must be resolved prior to taking any substantive trial action in this case, including voir dire of the Presiding Officer. For the Presiding Officer to continue having hearings outside the presence of all the commission members violates not only Mr. al Bahlul's due process rights, but the President's Order as well.

6. **Oral Argument**: The Defense requests oral argument on this motion, on the basis of the President's Military Order of 13 November 2001, which requires that Military Commission proceedings be "full and fair."

7. **Witnesses and Evidence**: Legal Advisor to the Appointing Authority for Military Commissions, Memorandum for the Presiding Officer, SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions (August 11, 2004) (2 pages).

8. In making this motion, or any other motion, Mr. al Bahlul does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

By: 

TOM FLEENER
Major, U.S. Army Reserves
Detailed Defense Counsel

UNITED STATES OF AMERICA	**D - 102 al Bahlul**
v.	**Prosecution Response** To Defense Motion To Continue the 01 March 2006 Hearing Due to Infectious Disease
ALI HAMZA SULAYMAN AL BAHLUL	**28 February 2006**

1. Timeliness. This Prosecution response is being filed within the timeline established by the Presiding Officer.

2. Relief. The Defense motion should be denied.

3. Overview. Defense requested a continuance of the scheduled 1 March 2006 Commission hearing due to the accused's alleged highly contagious disease – namely tuberculosis. The accused does not have active tuberculosis.

4. Facts.

(1). The facts as averred by defense counsel are irresponsible at best, disingenuous at worst, and clearly incorrect. Apparently taking the word of a guard at the detention facility, counsel failed to make even a cursory inquiry of the medical personnel/community responsible for detainee health care before jumping to an erroneous conclusion.

(2). Attached is the written "Declaration" of [redacted] MD, MPH, Captain, USN, Officer in Charge, Detainee Hospital, Joint Task Force – Guantanamo, Guantanamo Bay, Cuba. He has personal knowledge of, or has received information in the course of his responsibilities, concerning al Bahlul's alleged tuberculosis.

(3). Capt [redacted] states that al Bahlul ***does not*** have active tuberculosis, ***does not*** have any symptoms of tuberculosis, and ***does not*** require any special medical precautions because he is ***not*** infectious.

5. Legal Authority. It is within the discretion of the Presiding Officer whether to grant a continuance.

6. Discussion. Where there is no factual basis supporting the granting of a continuance, it follows that the request for continuance should be denied. To grant a continuance on a false factual allegation would be an abuse of discretion.

7. Oral Argument. If Defense is granted an oral argument, the Prosecution requests an oral argument in response.

8. Witnesses and Evidence. None required beyond the attachment to this Response.

9. Attachments. "Declaration" of [redacted], USN.

10. Submitted by:

[redacted]

Prosecutor

UNITED STATES

v.

ALI HAMZA SULAYMAN AL BAHLUL

DECLARATION

I [redacted] MD, MPH, hereby state that, to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

1. I am a Captain in the United States Navy with 22 years Active Federal Commissioned Service. I currently am the Officer in Charge, Detainee Hospital, Joint Task Force-Guantanamo, Guantanamo Bay, Cuba. I am directly responsible for the medical care provided to detainees and presently oversee the operation of the detention hospital that provides medical care to the detainees being held at Guantanamo.

2. I received my medical degree from the University of Mississippi, School of Medicine. I completed an internship at U.S. Naval Hospital, Jacksonville, Florida, a residency in Family Practice at U.S. Naval Hospital, Pensacola, Florida, and a residency in Preventive Medicine from the University of Washington, Seattle, Washington.

3. As the Officer-in-Charge of the detention hospital, I am the direct supervisor of the physicians and medical staff, who provide medical care to the detainees. I have personal knowledge of the procedures that are in place for the operation of the detention hospital and I am responsible for

ensuring that they are followed. I have personal knowledge of, or have received information in the course of my responsibilities concerning, the matter related to the allegations made by accused's counsel in his motion of February 28, 2006 for a continuance due to the accused alleged infectious tuberculosis.

4. I have reviewed ISN 039's medical record. ISN 039 does not have active tuberculosis. ISN 039 was administered the Purified Protein Derivative (PPD) test on 15 March 2002 and tested positive. The PPD is a screening test for exposure to tuberculosis. A positive test indicates that he may have been exposed to tuberculosis sometime during his life. The vast majority of people exposed to tuberculosis never develop active disease. He has no symptoms of tuberculosis and he has a normal chest X-ray. Therefore, he is not infectious and no special medical precautions apply.

[redacted]

Captain, Medical Corps, U.S. Navy

Executed on: 28 February 2006

UNITED STATES OF AMERICA	**D - 103 al Bahlul**
v.	**Prosecution Response** To Defense Motion To Quash the Order Directing a 28 February 2006 Hearing and Schedule an Immediate Hearing with All Commission Members
ALI HAMZA SULAYMAN AL BAHLUL	**1 March 2006**

1. **Timeliness**. This Prosecution response is being filed within the timeline established by the Presiding Officer. The Defense motion itself, however, is clearly untimely. "Law motions" were due to be filed no later than 22 February 2006. Defense counsel's argument that he could verbally raise this motion at the last hearing, but not ethically raise the same motion in writing within the time constraints set by the Presiding Officer is simply unavailing.

2. **Relief**. The Defense motion should be denied.

3. **Overview**. Defense requested relief to abate commission proceedings due to, as Defense alleged, "MCO No. 1's Fatal Inconsistency with the President's Military Order" is, in itself, fatally flawed. The revised MCO No. 1, and the changes thereto, is consistent with sec. 4(c)(2) of the President's Military Order, and unequivocally ensures "a full and fair trial, with the military commission sitting as the triers of both fact and law."

4. **Facts**.

(1). On 18 September 2001, in response to the attacks on the United States of September 11th, Congress passed a joint resolution which states, in part, "that the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 24.

(2). On 13 November 2001, the President promulgated his Military Order for the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 16, 2001). Individuals subject to this order shall include (a) non-U.S. citizens to whom the President determines from time to time in writing that: (1) there is reason to believe: (i) is or was a member of al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit acts of international terrorism, or act in preparation therefore ... against the U.S.; or (iii) has knowingly harbored one of the above individuals; and, (b) it is in the interest of the U.S. that such individual be subject to this order.

(3). On 21 March 2002, the Secretary of Defense issued Military Commission Order No. 1 that implemented policy, assigned responsibility, and prescribed procedures under the U.S. Constitution, Article II, section 2 and the President's Military Order (PMO), for trials before military commission of individuals subject to the PMO.

(4). On 31 August 2005, the Secretary of Defense issued the revised MCO No. 1 (hereinafter MCO No. 1) that superseded the previous MCO No. 1, but served the same purpose to implement policy, assign responsibility, and prescribe procedures under the U.S. Constitution, Article II, section 2 and the President's Military Order (PMO), for trials before military commission of individuals subject to the PMO.

(5). MCO No. 1 of 31 August 2005 included a DoD OASD (PA) press release headlined "Secretary Rumsfeld Approves Changes to Improve the Military Commission Procedures." The press release went on to state "these changes follow a careful review of commission procedures and take into account a number of factors, including lessons learned from military commission proceedings that began in late 2004." Most importantly, it was cited that "the principle effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury."

(6). On the same day of the DoD press release, the Legal Advisor to the Appointing Authority held a press conference and reiterated that ". . . the most significant change that we've made in the new Military Commission Order is the presiding officer will rule on all questions of law, challenges, and interlocutory questions. " The Legal Advisor specifically noted the previous order and the legal effect of the revised MCO No. 1, ". . . in the original order all members, including the Presiding Officer, decided all questions of law and fact. As far as evidence is concerned, the commission members remain authorized to take exception to rulings of the Presiding Officer on admission of evidence. But as far as questions of law and interlocutory questions, challenges in particular, those will be rulings for the Presiding Officer."

(7). The Legal Advisor explained the changes resulted, in part, on experience from commission sessions in August 2004, and that the changes "will make for a more orderly process."

(8). When asked if the changes were "to some degree a fundamental restructuring of the commission . . . and an admission that the commission's system as initially set up by the Pentagon was flawed, as some critics had said all along?" the Legal Advisor unequivocally said -- no. The changes were the result of lessons learned, made to improve the process, and consistent with the overall purpose of the commission.

5. **Legal Authority**.

a. President's Military Order (PMO), 66 Fed. Reg. 57,833 (Nov. 16, 2001).

b. Military Commission Order No. 1 (MCO No. 1) (REVISED Aug. 31, 2005).

c. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

d. *Udall v. Tallman*, 380 U.S. 1 (1965).

e. *National Cable & Telecommunications Association, et al v. Brand X Internet Services et al*, 125 S.Ct 2688 (2005)

f. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005); *cert. granted* Lexis 8222, No. 05-184 (U.S. 2005)

6. **Discussion**.

a. Military Commission Order No. 1 is consistent with the President's Military Order.

(1). Military Commission Order No. 1 of 31 August 2005 (hereinafter "MCO No.1") is consistent with the President's Military Order of November 13, 2001 (hereinafter "PMO"), including the requirement that the accused be provided a full and fair trial, with the military commission sitting as the triers[1] of both fact and law. *See* PMO ("Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism"), §4(c)(2), 66 Fed. Reg. 57,833 (November 13, 2001). The PMO requires only that the military commission members, collectively, sit as the "triers of both fact and law." *Id.* Section 4(C)(2), in other words, requires that the commission as a whole – as opposed to some outside body external to the appointed commission members -- decide all questions of fact and law. That is precisely what occurs under the amended MCO: the Presiding Officer of the commission rules "upon all questions of law," MCO No. 1 §4A(5)(a), and the remaining members of the commission determine "the findings [of fact] and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer." Id., § 4A(6). Taken as a whole, the Presiding Officer making his legal decisions and the other members making their factual decisions together constitute "triers of both fact and law" as required by the PMO.

(2) One need look no further than courts-martial practice to understand that there can be differing roles for the members of a court-martial. The Uniform Code of Military Justice (UCMJ) defines a Court Martial as "the military judge *and* members of a general or special court martial." *See 10 U.S.C. §816 (2005)* (Emphasis added). Just like the Presiding Officer is a member of the commission, the military judge is a member of the court-martial itself. The Rules for Courts Martial (R.C.M) then go on to define the Military Judge as the *Presiding Officer* of a General or Special Court-martial detailed in accordance with Article 26; the identical title afforded the analogous position at military commissions. *See R.C.M. 801.* However, such a definition of the court-martial itself does not preclude the Military Judge from handling issues of law on his own, in the absence of the other members, or for the other members to determine issues of fact and adjudge sentence without the military judge. *See 10 U.S.C. §826, §839 (2005).* The fact that the UCMJ goes on to determine the specific roles the members of a court-martial serve, while the PMO does not for military commissions, does not in any way indicate that the President contemplated a drastic

departure from American legal tradition in his order, as the defense claim could require commissioned officers who have no legal training to decide issues of law, when he ordered that the accused would enjoy a full and fair trial with the military commission sitting as the triers of law and fact."

(3). There is no basis for reading the language of section 4(c)(2) ("sits as triers of both fact and law") to require each commission member to decide all questions of law and fact. When placed in the context of other provisions of the PMO, it is clear that section 4(c)(2) merely requires that *some* from among the commission members must resolve all legal or factual questions. Section 4(c)(3), for example, distinguishes between the roles of the "presiding officer" and "other member[s]," thus expressly contemplating the separate allocation of authority among military commission members.[2] Sections 4(c)(6) and (c)(7) provide for conviction and sentencing "only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present." By making clear that the military commission need not act by unanimity or with all members present, these provisions, together with section 4(c)(3), demonstrate that there is no requirement for each member to decide all questions of fact and law.

b. The Secretary of Defense has the authority to issue MCO No. 1 and revisions thereto.

(1.) There is simply no basis for declaring the changes to MCO No.1 inconsistent with the PMO. The President entrusted the Secretary of Defense with broad authority to promulgate such orders and regulations as may be necessary to carry out the PMO to provide for trial by military commission, including "rules for the conduct of the proceedings of military commissions." *See* PMO, §§ 4(b), 4(c), and 6(a) ("The Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.") It is accordingly the Secretary of Defense -- not this commission -- who has discretion to adopt any reasonable interpretation of the PMO. *See Udall v. Tallman*, 380 U.S. 1, 18 (1965)(agency interpretation of President's order is lawful "if...the [agency]'s interpretation is not unreasonable, if the language of the orders bears [its] construction"). In particular, the Secretary of Defense has authority under section 4(b) to specify the duties for the commission members to the extent that the President has not expressly done so in his order (as he has through the eight specific requirements in section 4(c)). *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S 837, 843 (1984) (agency's power to administer a statute "necessarily requires the formulation of policy and the making of any rules to fill any gap left, implicitly or explicitly, by Congress")(internal quotation marks and citations omitted).

(2). "Ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *See National Cable & Telecommunications Association, et al v. Brand X Internet Services et al*, 125 S.Ct 2688, 2699-2700 (2005). Filling these gaps, the Court explained, involved different policy choices

[2]The revised MCO No.1, of course, maintains the specific procedure set forth in section 4(c)(3), allowing a majority of the commission to override the presiding officer's ruling on the admissibility of evidence.

that agencies are better equipped to make than courts. *See Id.* If a statute is ambiguous, and the implementing agency's construction reasonable, federal courts are required to accept the agency's construction of a statute, even if the agency's reading differs from what the court believes is the best statutory construction. *See Id.*

(3). To support its position on the proper interpretation of the PMO, the Defense cites to the fact that both Col Brownback, as the Presiding Officer in *U.S. v Hicks*, and General Hemingway, the Legal Advisor to the Appointing Authority, have at one time held the identical position that the defense now claims. This fact is of no consequence, and actually illustrates the Prosecution's position that reasonable minds can disagree on the interpretation of the PMO, as Col Brownback's cited ruling was made *only after* Col Brownback attempted to hold sessions on his own (which based on his email correspondence to various counsel[3] he believed was proper under the President's Military Order and even the *original* MCO No. 1). It was only after he was given a specific directive by the Legal Advisor to the Appointing Authority not to hold session of the commission outside the presence of other members did Col Brownback make the ruling cited by the defense. This difference of opinion between the Presiding Officer and the Legal Advisor is a perfect illustration of how reasonable minds may disagree regarding the requirement of having the entire commission present under the PMO, and, therefore proves that the Secretary of Defense's current interpretation as set forth in the revised MCO No. 1 is, in fact, reasonable. However, in any event, the Legal Advisor's prior interpretation of the PMO has no binding, legal effect and has since changed.

(4). Even a change by an agency in its *own previous interpretation* of a statute, providing the change is reasonable, still requires deference be given to the agency's new interpretation. *See National Cable & Telecommunications Association, et al v. Brand X Internet Services et al*, 125 S.Ct 2688, 2699-2700 (2005). (Emphasis added). "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider *varying interpretations* and the wisdom of its policy on a continuing basis." *See Id* at 2699-2700. In amending MCO No. 1, the Secretary of Defense made just such a change, based the change on sound reasoning, and the Legal Advisor to the Appointing Authority explicitly adopted that reasoning; which sufficiently foreclosed the issue of the Legal Advisor's past interpretation of the PMO.

(5). The recent change in MCO No. 1 included a DoD OASD (PA) press release headlined "Secretary Rumsfeld Approves Changes to Improve the Military Commission Procedures." The press release went on to state "these changes follow a careful review of commission procedures and take into account a number of factors, including lessons learned from military commission proceedings that began in late 2004." Most importantly, it was cited that "**the principle effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury.**" (emphasis added). It is also important to note the patently obvious; such a delineation of the roles of members of a judicial body goes back to the very beginning of our American legal traditions, and also closely tracks typical military courts-martial practice.

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[3] See *U.S. v Hamdan* Record of Trial, Volume 3, Review Exhibit 12, Pages 8-10 of 15 for Col Brownback's email and Page 14 of 15 for the Legal Advisors' opinion of 11 August 2004. Found at http://www.defenselink.mil/news/Nov2005/d20051110Hamdanvol6.pdf

(6). Following the revision to MCO No. 1, the Legal Advisor to the Appointing Authority held a press conference and reiterated that ". . . the most significant change that we've made in the new Military Commission Order is the presiding officer will rule on all questions of law, challenges, and interlocutory questions.[4]" The Legal Advisor specifically noted the previous order and the legal effect of the revised MCO No. 1, ". . . in the original order all members, including the Presiding Officer, decided all questions of law and fact. As far as evidence is concerned, the commission members remain authorized to take exception to rulings of the Presiding Officer on admission of evidence. But as far as questions of law and interlocutory questions, challenges in particular, those will be rulings for the Presiding Officer."

(7). The Legal Advisor explained the changes resulted, in part, on experience from commission sessions in August 2004, and when asked if the changes were "to some degree a fundamental restructuring of the commission . . . and an admission that the commission's system as initially set up by the Pentagon was flawed, as some critics had said all along?" the Legal Advisor unequivocally said -- no. The changes were the result of lessons learned, made to improve the process, and consistent with the overall purpose of the commission. Such changes, for such reasons, were the exact type of analysis that the Supreme Court stated would, could and should be made by implementing agencies as they continue to consider the wisdom of their policies, and why such changes should be given deference. *See National Cable and Telecommunications Association v Brand X at 2699-2700.*

(8). In the press release accompanying the changes to MCO No. 1 on 31 August 2005, the Secretary of Defense also made the *specific* determination that nothing in the PMO, including section 4(c)(2), is inconsistent with those changes. Even if such a determination is not controlling of its own force before this commission, it is controlling *in this context* because, as explained above, that determination plainly reflects a reasonable reading of the PMO and therefore there is no warrant for not deferring to the Secretary of Defense's determination.

(9). Although the government concedes that the defense's position on the interpretation of the PMO could also be a reasonable interpretation of the PMO, it is the Secretary of Defense's reasonable interpretation that must trump, as it is ultimately his agency which is responsible for executing the President's Military Order to try individuals by military commission. Furthermore, the Secretary of Defense's interpretation is the more reasonable interpretation of the President's Military Order because it makes the commission body more closely resemble court-martial practice in the military, and American legal tradition in the federal and state courts of our nation. It is legally impossible to find an interpretation unreasonable on the language in the PMO that makes the commission body consistent with our nation's legal traditions, as opposed to an interpretation that would be a significant departure from Anglo-Saxon legal principles by potentially requiring commissioned officers who have no legal training to decide issues of law.

[4] This statement by the Legal Advisor to the Appointing Authority has, in effect, rescinded any earlier legal opinions he may have given that run contrary to his present position.

c. The President has not expressed any disagreement with the revised MCO No. 1

(1). The Department of Defense has publicly and unambiguously stated its position that the changes that have been made to MCO No.1 are "consistent with the President's Military Order of Nov. 13, 2001 that established the military commission process to try enemy combatants for alleged violations of the law of war." *See* Department of Defense News Release of 31 August 2005 "Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures" (available at http://www.defenselink.mil/releases/2005/nr20050831-4608.html). If the President, as Chief Executive and Commander in Chief of the Armed Forces believed that his order had been violated by the promulgation of the revised MCO No.1, he could have addressed that issue by ordering the Secretary of Defense, his subordinate, to rescind the revised order. He did not do so.

(2). Unlike reading too much into Congressional silence on an agency's interpretation of one of its statutes, the President's silence on this issue should be reasonably interpreted as his acceptance of the Secretary of Defense's conclusion that the changes are consistent with the PMO, particularly considering that the changes were made public on 31 August 2005 after coordination with various agencies in the United States Government. *See* Special Defense Department Briefing on Military Commissions from the Legal Advisor to the Appointing Authority, 31 August 2005. (Briefing can be found at http://www.defenselink.mil/transcripts/2005/tr20050831-3821.html). It is implausible to believe that the President was not aware of the changes that were made to MCO No.1 on 31 August 2004, or that he remains unaware to this day. The President's silence regarding the Secretary of Defense's determination that MCO No. 1 is consistent with the PMO provides even greater reason for deferring to that determination. Given that the President expressly entrusted the Secretary of Defense with the power to interpret and implement the PMO, the revised MCO No. 1 should not be revisited by this commission absent a clear, palpable, and unequivocal conflict between the two documents - - and there is none.

(3). In sum, Military Commission Order No. 1 is consistent with, and implements, the President's Military Order. The Defense motion to abate the proceedings should be denied.

7. **Burdens**. As the movant, Defense bears the burden to show that MCO No. 1 is in conflict, fatally or otherwise, with the PMO, and denies the accused's right to a full and fair trial. Defense attempts to disguise this as a "jurisdictional" motion and shift the burden to the Prosecution; however, Defense's motion challenges "how" not "whether" the accused may be tried by a military commission. An argument "how the commission may try" the accused is "by no stretch a jurisdictional argument." *Hamdan v. Rumsfeld,* 415 F.3d 33, 42 (D.C. Cir. 2005). The PMO is the jurisdiction authority as to "whether" the accused is subject to trial by military commission. MCO No. 1 contains the implementing procedures for "how" the accused shall be tried. The PMO and MCO No. 1 are not in conflict, and any perceived procedural inconsistency by Defense does not make a non-jurisdictional issue a jurisdictional defect.

8. **Oral Argument**. If Defense is granted an oral argument, the Prosecution requests an oral argument in response.

9. **Witnesses and Evidence**.

a. No Prosecution witnesses are required for purposes of our response to the Defense motion.

b. Prosecution evidence in support of our response is the following:

i. Department of Defense News Release of 31 August 2005 "Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures" (available at http://www.defenselink.mil/releases/2005/nr20050831-4608.html)

ii. Special Defense Department Briefing on Military Commissions from the Legal Advisor to the Appointing Authority, 31 August 2005. (Briefing can be found at http://www.defenselink.mil/transcripts/2005/tr20050831-3821.html)

10. **Additional Information**. None.

11. **Attachments**. None.

12. **Submitted by**:

[redacted] Lt Col, USAFR
Prosecutor

Filings Inventory - US v. al Bahlul

PUBLISHED: 1 March 2006

Issued in accordance with POM #12-1.
See POM 12-1 as to counsel responsibilities.

This Filings Inventory includes only those matters filed since 4 Nov 2005.

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	RE

Defense (D Designations)
Dates in red indicate due dates

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 102: Motion for a continuance – Accused's medical Condition	28 Feb 06	28 Feb		• A. Prosecution response.	OR –160 A - 162
D 103: Motion to quash	28 Feb 06	1 Mar		• A. Prosecution response.	OR – 161 A - 163
				•	

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
PO 101 – Resumption of Proceedings Memo	• Sent to counsel 16 Nov by email; DC personally served at GTMO. • A. Prosecution calendar (para 7b, PO 101) • B. Defense reply and PO response (para 7c, PO 101), 16 Dec • C. Prosecution reply to para 7c, PO 101, 12 Dec • D. Defense response to PO directions (PO 101 B) and to PO 101, 19 Dec • E. DC email and PO Response, 20 Dec 05 •	OR - 102 A – 112 B – 123 C – 124 D -125 E – 126
PO 102 – Collection of Pro Se materials	• Sent to counsel 16 Nov by email; DC personally served at GTMO. • A. PO Email to MAJ Fleener and ALCON on case concerning duties of detail counsel and representation, 22 Nov 05 • B. PO email to CDC and DDC on DDC duties, 22 Nov 05. • C. DDC reply to PO 101 A, 28 Nov • D. CDC email about al Bahlul's desires as to counsel 1 Dec. • E. Draft request for opinion to SOCO for comment - 1 Dec 05. • F. Defense request for delay to submit comments and PO decision, 1 Dec 05. • G. PO request to SOCO for opinion, 6 DEC 05. • H. DC request for Opinion to Iowa Bar and enclosures. • I. SOCO opinion in response to PO 1 G. • J. DC request for SOCO opinion less enclosures (See APO	OR - 101 A - 113 B - 114 C - 115 D - 116 E - 117 F - 118 G – 119 H – 128 I – 129 J – 130 K – 141 L – 147 M – 148 N – 152 O - 158

	note on page 1) • K. PO 102 K - al Bahlul - PO request to CCMC to send matters to Iowa Bar (17 Jan 06) • L. PO request for copies of DDC request to withdraw and CDC denial of same, 24 Jan 06. • M. Items CCMC sent to Iowa Bar. • N. PO ruling on request to proceed pro se. • O. Opinion of Iowa Bar RE MAJ Fleener, 24 Feb 06	
PO 103 - Docketing and Scheduling	• Announcement Jan 06 session, defense request for delay, PO decision - 1 Dec 05 • A. Announcement of Jan 06 session Specific times, 9 Dec 05. • B. Presence of LT Trivett at Jan session. • C. Announcement of Feb trial term, 19 Jan 06 • D. Trial Order, 24 Jan 05 • E. Preparation for voir dire, 7 Feb 06 • F. PO response to defense voir dire questions, 24 Feb	OR - 120 A - 121 B – 122 C – 143 D – 149 E – 155 F - 156
PO 104 – Discovery	• Discovery Order, 24 Jan 06	OR – 150
PO 105 – Transcripts	• Service of Draft Session Transcript, 12 Jan 06	OR - 151

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	RE
Pro Ord D is the first filing for ProOrds					
		2	9 Jul 04	Legal Advisor Protective Order - Classified Information	**108**
		2	30 Jun 04	Legal Advisor Protective Order – Unclassified Sensitive Information	**109**
		2	17 Mar 04	Legal Advisor Protective Order - Unclassified Sensitive Information	**110**
		1		PO Order on name of Translators	
	Protective Order # 1	1	23 Jan 06	ID of all witnesses	**144**
	Protective Order # 2	2	23 Jan 06	ID of investigators	**145**
	Protective Order # 3	3	23 Jan 06	FOUO and other markings	**146**

Inactive Section

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference Notes	RE

Inactive Section

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 101: Motion for an Order Preserving Potential Evidence	11 Jan 2006	18 Jan 06		• Motion filed. • A. Response filed • B ruling by PO (Motion denied) 7 Feb 06	OR - 140 A – 142 B - 154
				•	
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Inactive Section

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE

Unauthorized Practice of Law

VIRGINIA UPL OPINION 133

Military Lawyers , Virginia State Bar Membership Status.

You have indicated that you are a newly admitted member of the Virginia State Bar engaged in practice as a member of the Judge Advocate General's Corps of the United States Naval Reserve. You are currently an active member of the Virginia State Bar.

You have raised three questions: (1) Is an associate member of the Virginia State Bar generally considered to be a member "in good standing?," (2) Is military law practice by associate members of the Virginia State Bar considered to be unauthorized practice of law?; and (3) May a Virginia associate member engage in military practice within Virginia?

Your first question is a factual one: The term "in good standing" is applicable to associate members as well as to active members. The use of the term however, does not delineate the level of membership. "In good standing" simply refers to whether or not requirements to maintain that specific level of membership have been met, i.e., appropriate dues paid and, in the case of active members, compliance with the requirements for completion of Legal Ethics course and Mandatory Continuing Legal Education course hours.

With regard to your other two questions, the Committee is of the opinion that, to extent that a military attorney's practice is not regulated by federal law specific to his particular branch of service, the attorney must maintain his status as an active member in good standing of the Virginia State Bar, complying with all necessary requirements. Thus, if the only bar membership maintained by the attorney is associate status in the Virginia State Bar, with no active membership in any other state, it is the Committee's opinion that the attorney may not engage in the practice of law. Earlier opinions of the Committee which indicated that it is not the unauthorized practice of law for an attorney not licensed in Virginia to represent individuals before military courts and boards on military reservations or to give legal advice and assistance to members of the military and their dependents in Virginia were both predicated on the facts that the attorney(s) "not licensed in Virginia" were in fact members of the bar of at least one other state. See: UPL Opinions Nos. 89 and 108.

Committee Opinion
April 20, 1989

RE 165 (al Bahlul)
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MJ3 Mru

Hodges, Keith H. CIV (L)

From: [redacted] CPT, DoD OGC [redacted]
Sent: Monday, August 23, 2004 5:53 PM
To: 'Pete Brownback'
Cc: 'Hodges, Keith H. CIV (L)'; Hemingway, Thomas, BG, DoD OGC; Altenburg, John, Mr, DoD OGC; [redacted] LTC, DoD OGC
Subject: MCI No. 8

Sir:

For you informational and planning purposes:

The Appointing Authority for Military Commissions is recommending to the General Counsel of the Department of Defense that he amend Sections 4 and 5 of Military Commission Instruction No. 8 to make clear the Military Commission's role in deciding all issues of fact and law.

The recommendation is to make Sections 4 and 5 read as follows:

4. INTERLOCUTORY QUESTIONS

A. *Certification of Interlocutory Questions.* Except for determinations concerning protection of information as set forth in Section 6(D)(5) of reference (a) and the probative value of evidence, the full Commission shall adjudicate all issues of fact and law in a trial. Determinations concerning the probative value of evidence are governed by Section 4(c)(3) of reference (b). In accordance with Section 4(A)(5)(d) of reference (a), however, the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. In addition, the Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

B. *Submission of Interlocutory Questions.* The Presiding Officer shall determine what, if any, documentary or other materials should be forwarded to the Appointing Authority in conjunction with an interlocutory question.

C. *Effect of Interlocutory Question Certification on Proceedings.* While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

5. IMPLIED DUTIES OF THE PRESIDING OFFICER

The Presiding Officer shall ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission in accordance with reference (a). Such functions include, for example, scheduling the time and place of convening of a military commission, ensuring that an oath or affirmation is administered to witnesses and military commission personnel as appropriate, conducting appropriate *in camera* meetings to facilitate efficient trial proceedings, and providing necessary instructions to other commission members. Notwithstanding the role of the Presiding Officer and Commission Members in voting on issues of law and fact as set forth in Paragraph 4(A) above, and decisions concerning the probative value of evidence as set forth in Section 4 (c)(3) of reference (b), the Presiding Officer shall have independent responsibility for issuing protective orders and deciding upon issues of limited disclosure of information pursuant to Sections 6(D)(5)(a) and

(b) of reference (a) and for directing closure of proceedings pursuant to Section 6(B)(3) of reference (a).

v/r
CPT [redacted]
Assistant Legal Advisor
Office of the Appointing Authority
for Military Commissions

From: [redacted] Col, DoD OGC" [redacted]
To: "'Pete Brownback'" [redacted]
Cc: "keith - work" [redacted] "keith - home"
[redacted]
Subject: RE: Counsel and the Authority of the Presiding Officer
Date: Saturday, July 31, 2004 10:37 AM

COL Brownback,

I am encouraging defense counsel to file appropriate motions. I'm certain that counsel will provide briefs that illuminate their interpretations of the law. However, I believe the issue of whether a presiding officer can sit alone has been interpreted by the Secretary of Defense. The following language from Military Commission No. 1 convinces me that commission members must attend all sessions:

4. COMMISSION PERSONNEL
A. Members
(1) Appointment
DoD MCO No. 1, March 21, 2002
The Appointing Authority shall appoint the members and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission, but the absence of an alternate member shall not preclude the Commission from conducting proceedings. (emphasis added).

I point this out in my role as Chief Defense Counsel in the hopes of facilitating full and fair proceedings.

Thank you,
Col [redacted]

Col [redacted]
Chief Defense Counsel
Office of Military Commissions
[redacted]
DSN [redacted]
[redacted]

-----Original Message-----

From: Pete Brownback [redacted]
Sent: Friday, July 30, 2004 09:03
To: [redacted] Col, DoD OGC
Cc: keith - work; keith - home; Altenburg, John, Mr, DoD OGC; Hemingway, Thomas, BG, DoD OGC; [redacted]
[redacted] Swann, Robert, COL, DoD OGC
Subject: Re: Counsel and the Authority of the Presiding Officer

COL[redacted]

1. I appreciate the time and effort which you took to prepare your comments on my memorandum.

2. As I have stated in at least one email on which you were CC, I recognize that there may be legitimate differences in interpretation of the law/fact question and how it affects the role and authority of the Presiding Officer vis-a-vis the other members. Any given interpretation could be incorrect - whether it be mine, yours, or that of some other commentator. That having been said, there must be a process to determine the correct interpretation. As I see it, there are two different methods by which the issue may be answered: the Presiding Officer can hear the matter or the full Commission can hear it.

3. Someone (either the Presiding Officer or all the members) must have the responsibility to decide and determine the correct process. If my interpretation of Commission Law generally and the law/fact issue specifically was different (I note that I have been required to make my own interpretation without benefit of a notice of motion, much less a motion or brief from counsel.), I would have the full Commission participating. But, at this point, absent assistance from counsel or directive guidance from competent authority, my best interpretation is that I have the authority to do what I have directed be done. If I did not believe I had that authority, I would not attempt to exercise it.

4. I was recalled to active duty on 14 July 2004. I made and continue to make a thorough study of what you call the "...hierarchy of law that applies to military commissions." I have done this without the assistance of counsel - some of whom, I note, have been working these issues for over six months.

5. In this regard, I have asked counsel for both sides to file notice of motions, and then motions. Certainly, since I did not limit the scope of potential motions, one could or should have been made to show me that my interpretation of the law/fact question is incorrect. Until I see a motion by a counsel detailed to the case which convinces me that my interpretation of Commission Law is incorrect, I must go with what I currently believe to be correct. I know of no other way to proceed at this point, but counsel have the opportunity to show me otherwise.

6. You closed your email with the observation, "I leave it to detailed defense counsel to interpret these provisions for themselves and raise whatever objections they determine to be in their clients' best interests." I wholeheartedly agree with your observation insofar as it applies to the substance of the objections which they might raise and the motions which they might make. I do not read your comment to imply that counsel may refuse to participate in the process of raising objections or making motions.

7. I ask you within the limits of your position to urge Defense Counsel to file the appropriate motions. I also echo your mention of the rules of professional responsibility with respect to candor toward the tribunal. Candor tells me that if a counsel honestly believes that I do not have certain authority, the counsel should file a motion, in order to show me my error. Until such a time, my interpretation is the one which will be used by this Presiding Officer.

Peter E. Brownback III

COL, JA
Presiding Officer

----- Original Message -----

From: [redacted] Col, <mailto[redacted]> DoD OGC

To: 'Pete Brownback' <mailto[redacted]>

Cc: keith - work <mailto[redacted]> ; keith [redacted] - home ; Altenburg, John, Mr, DoD OGC [redacted] ; Hemingway, [redacted] Thomas, BG, DoD OGC ; [redacted] Swift, Charles,

[redacted]

Sent: Thursday, July 29, 2004 5:37 PM

Subject: RE: Counsel and the Authority of the Presiding Officer

COL Brownback,

1. I disagree with your interpretation that you have the authority to conduct military commission proceedings without the presence of all commission members. In paragraph 3 of your 28 July 2004 memorandum to me, you state that you have certain powers to act on behalf of the military commission, to include the power to decide pretrial matters and motions and to order counsel to perform certain acts. You conclude by asserting that you "have authority to order those things which I order done." However, it is clear to me that reasonable minds may disagree about the extent of your powers.

2. While your assertion of authority may be consistent with the powers of a judge in an established criminal justice system, those same powers do not necessarily apply to a presiding officer in military commissions established pursuant to the President's Military Order of 13 November 2001. There is a hierarchy of law that applies to military commissions. The President's Military Order, which sits atop that hierarchy, establishes the governing principles for military commissions. The subsequent Military Commission Orders and Instructions that have been issued cannot be inconsistent with the President's Military Order, as recognized by section 6(a) of the President's Military Order and Military Commission Order No. 1 (see paragraph 7B). All powers exercised by a presiding officer must flow from, and not be inconsistent with, the President's Military Order.

3. The President's Military Order requires that orders and regulations issued with respect to military commissions shall provide for "a full and fair trial, with the military commission sitting as the triers of both fact and law." (see Section 4(c)(2)). A plain language interpretation of this provision of the President's Military Order requires that the military commission members, as a whole, decide issues of fact and law. Any

provisions inconsistent therewith would be invalid. Although I recognize that some portions of the Military Commission Orders and Instructions may be inconsistent with this provision in the President's Military Order, to the extent that those orders and instructions are inconsistent with the President's Military Order, they are invalid.

4. In his memorandum to the Legal Advisor to the Appointing Authority, dated 28 July 2004, your assistant, Mr. Hodges, states that this provision in the President's Military Order "might be misinterpreted by others in determining the role of the Presiding Officers vis-à-vis the other Commission Members." Mr. Hodges then concedes that an ambiguity between the President's Military Order and the Military Commission Orders and Instructions "may make it unclear which pretrial functions a Presiding Officer may perform without involvement by other Commission Members." Your assistant's concession stands in stark contrast to your assertion of unlimited and unquestioned power. My understanding of the President's Military Order is clear - only the military commission (not the presiding officer alone) may act as triers of both fact and law. The President has made a determination that there should not be a judge in this process. Furthermore, the President determined that it is "not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." (see Section 1(f)). Although Mr. Hodges may find this to be an inefficient and unwieldy process, it is the one that the President has provided.

5. The views I express here are my own, as Chief Defense Counsel. As such, I leave it to detailed defense counsel to interpret these provisions for themselves and raise whatever objections they determine to be in their clients' best interests. However, as supervisory attorney for all defense counsel involved in military commissions, I recognize certain duties that all counsel have with respect to the military commissions. At a minimum, these duties include those discussed in Rule 3.3 of the Army Rules of Professional Conduct for Lawyers, Rule 3.3 of Navy JAGINST 5803, and Rule 3.3 of the Air Force Rules of Professional Conduct. These provisions all pertain to an attorney's duty of candor toward a tribunal. I am advising defense counsel to uphold their responsibilities under applicable professional responsibility standards.

Col [redacted]

Chief Defense Counsel

Office of Military Commissions

[redacted]

DSN [redacted]

[redacted]

-----Original Message-----
From: Pete Brownback [redacted]
Sent: Wednesday, July 28, 2004 22:03
[redacted]
Subject: Counsel and the Authority of the Presiding Officer

Memorandum For: [redacted] Chief Defense Counsel 28 July 2004

Subject: Counsel and the Authority of the Presiding Officer

1. References:

a. The President's Military Order of 13 November 2001

b. DOD Military Commission Order No. 1, 21 March 2002

c. DOD Dir 5105.70, 10 February 2004

d. DOD Military Commission Instruction 1, 30 April 2003

e. DOD Military Commission Instruction 3, 30 April 2003

f. DOD Military Commission Instruction 4, 30 April 2003

g. DOD Military Commission Instruction 5, 30 April 2003

h. DOD Military Commission Instruction 6, 30 April 2003

i. DOD Military Commission Instruction 7, 30 April 2003

j. DOD Military Commission Instruction 8, 30 April 2003

k. DOD Military Commission Instruction 9, 16 December 2003

l. Memorandum, Mr. Hodges to Legal Advisor to the Appointing Authority,

Subject: Need for MCO Instructions or Decision, 28 July 2004 (Incl 1)

2. It has come to my attention (e.g., see Incl 2 - Email from LCDR [redacted] 28 Jul 04) that certain counsel may be operating under a misapprehension concerning my authority as the Presiding Officer. Please note that this memorandum does not specifically address any case or any counsel - it covers all four of the cases to which I have been detailed and all of the counsel, whether prosecution or defense, detailed to those cases.

3. So that there is no question of my view in these matters, let me state the following:

a. I have the authority to set, hear, and decide all pretrial matters.

b. I have the authority to order counsel to perform certain acts.

c. I have the authority to set motions dates and trial dates.

d. I have the authority to act for the Commission without the formal assembly of the whole Commission.

The above listing is not supposed to be all inclusive. Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done.

4. I base my view upon my reading and interpretation of the references. (I note that my analysis of the references comports with that contained in reference 1l.) I recognize that any one person's interpretation of various documents might be wrong. However, in the cases to which I have been appointed as Presiding Officer, my interpretation is the one that counts:

a) until the cases have been resolved and the cases are reviewed, if necessary, by competent reviewing authority (See reference 1k.). At that time, there will be an opportunity for advocates, for either side, to state that the Presiding Officer was wrong in his interpretation of the references or in his actions based upon those interpretations. If so, competent reviewing authority will determine the remedy, if any. Or,

b) until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing

Authority) issues directives stating that what I am doing is incorrect.

5. No counsel before the Commission is a competent reviewing authority or a superior competent authority. When I issue an order, counsel are encouraged and required, by myself and their oaths, to tell me that they believe I am acting improperly and to provide me the citations and interpretations which support their beliefs. I will consider such reply. I will then make a decision. If my decision is that my prior order will stand, counsel are required to comply with my order.

6. In this regard, I direct your attention to paragraph 4A(5)(b) of reference 1b. As you stated in an email to the Appointing Authority today,

As you are aware, my primary responsibility as Chief Defense Counsel is to provide professional supervision for the personnel assigned to the Office of the Chief Defense Counsel. As we proceed, I believe that it is critical for individuals involved in this process to stay within their areas of responsibility.

The Chief Defense Counsel, the Chief Prosecutor, the Appointing Authority, all counsel, and myself have varying areas of responsibility. I do not wish to have a case delayed, an accused disadvantaged, or a counsel lost due to a misunderstanding by counsel of my authority. There is plenty of time on appeal, if necessary, to correct any mistake I might make. Once a counsel's objection to an order is on the record (by memorandum, email, or witnessed conversation - to name but a few methods), the counsel must accept and comply with my order or face sanctions, which no one wishes to have happen.

2 Incl:
as

Peter E. Brownback III
COL, JA
Presiding Officer

CF:

Appointing Authority

Legal Advisor to the Appointing Authority

Chief Prosecutor

All Counsel

Note to COL [redacted]/COL Swann,

If I failed to cc any counsel currently detailed to cases, please insure that this email is forwarded to them.

COL Brownback

[redacted]

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

August 11, 2004

MEMORANDUM FOR Presiding Officer, Colonel Peter Brownback

SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions

The Orders and Instructions applicable to trials by Military Commission require the presence of all members and alternate members at all sessions/proceedings of Military Commissions.

The President's Military Order (PMO) of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," requires a full and fair trial, with the military commission sitting as the triers of both fact and law. *See Section 4(c)(2).* The PMO identifies only one instance in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer's opinion by a majority of the Commission. *See Section 4(c)(3).*

Further, Military Commission Order (MCO) No. 1 requires the presence of all members and alternate members at all sessions/proceedings of Military Commissions. Though MCO No. 1 delineates duties for the Presiding Officer in addition to those of other Commission Members, it does not contemplate convening a session of a Military Commission without all of the members present.

The "Commission" is a body, not a proceeding, in and of itself. Each Military Commission, comprised of members, collectively has jurisdiction over violations of the laws of war and all other offenses triable by military commission. The following authority is applicable.

- MCO No. 1, Section 4(A)(1) directs that the Appointing Authority shall appoint the members and the alternate member or members of each Commission. As such, the appointed members and alternate members collectively make up each "Commission."

- MCO No. 1, Section 4(A)(1) also requires that the alternate member or members shall attend all sessions of the Commission. This requirement for alternate

[redacted]

[redacted]

members to attend all sessions assumes that members are required to attend all sessions of the Commission, as well.

- MCO No. 1, Section 4(A)(4) directs the Appointing Authority to designate a Presiding Officer from among the members of each Commission. This is further evidence that the Commission was intended to operate as an entity including all of the members.

- MCO No. 1, Section 4(A)(4) also states that the Presiding Officer will preside over the proceedings of the Commission from which he or she was appointed. Implicit in this statement is the understanding that there are no proceedings without the Commission composed of and operating with all of its members. The Presiding Officer is only one of the appointed members to the Commission, who in addition, presides over the proceedings of the Commission.

Thomas L. Hemingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel
Chief Prosecutor

[redacted]

UNITED STATES OF AMERICA v. ALI HAMZA AL BAHLUL	**Defense Motion** to Extend Deadlines for Filings 2 March 2006

1. This motion is filed by the Defense in the case of the *United States v. Ali Hamza al Bahlul*.

2. **Relief Requested**: The Defense moves to extend the deadline for filings.

3. **Facts**:

   a. Detailed counsel is the sole defense counsel in this case.

   b. There have been two teams of prosecutors working on this case for several years.

   c. Mr. al Bahlul has not accepted detailed counsel because he wishes to be his own lawyer.

4. **Argument**:

Detailed defense counsel needs much more time in order to have any hope of garnering an attorney/client relationship with Mr. al Bahlul. Counsel needs additional time to attempt to coordinate the involvement of a Yemeni attorney. Consequently, in order for Mr. al Bahlul to have any hope of receiving a full and fair trial, detailed defense counsel must have more time.

The United States has held Mr. al Bahlul for over four years, essential incommunicado. It takes time to gain a measure of trust while at the same time respecting his autonomy. It is in everyone's interest to have a trial with defense counsel working with the client to vigorously test the Government's evidence. Without more time, this will not happen. Respectfully request a liberal extension for filings.

By: _____
TOM FLEENER
Major, U.S. Army Reserves
Detailed Defense Counsel

UNITED STATES OF AMERICA	)	**D103** **DEFENSE REPLY TO PROSECUTION RESPONSE**
v.	)	Motion to Quash the Order Directing a 28 February 2006 Hearing and Schedule an Immediate Hearing with All Commission Members
ALI HAMZA AL BAHLUL	)	
	)	**March 2, 2006**

1. This reply is filed by the Defense in the case of the *United States v. Ali Hamza al Bahlul.*

2. **Replies:**

a. The Prosecution never explains how its argument that the Presiding Officer serves as the sole trier of law can be reconciled with the PMO's plain language. Of course, the Prosecution fails to do so because it cannot. The revised MCO No. 1 is fatally inconsistent with the PMO's plain language. "The Supreme Court has instructed that a statute must be read as 'mandated by [its] grammatical structure.' *Ron Pair Enterprises, Inc.*, 489 U.S. [235, 241 (1989)] (relying on location of commas in 11 U.S.C. § 506(b) to provide interpretation of statute)." *In re Frieouf*, 938 F.2d 1099 (10th Cir. 1991). *Accord Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 80 (1991). "[T]he plain meaning of a text 'will typically heed the commands of its punctuation.' *United States Nat'l Bank*, 508 U.S. at 454." *Kahn Lucas Lancaster v. Lark Int'l*, 186 F.3d 210, 215 (2d Cir. 1999). The plain meaning of the PMO's language does not permit any one member of the commission to rule on legal questions.

b. MCO 1 is not entitled to *Chevron* deference. The Prosecution wants Mr. Al Bahlul to be sentenced to incarceration at the conclusion of these proceedings. The government intends to continue deprive him of his liberty. This is a form of punishment. Mr. al Bahlul is

accused of committing war crimes. While Mr. al Bahlul's case is not capital, other commissions may impose death sentences. The proceedings against Mr. al Bahlul are criminal in nature.

c. Because these proceedings are criminal, *Chevron* deference is inapplicable. The United States Court of Appeals for the Sixth Circuit has explained, "Judicial deference under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases. *See* [*Evans v. United States Parole Comm'n*, 78 F.3d 262, 265 (7th Cir. 1996).] The rule of lenity requires a stricter construction of 'ambiguity in a criminal statute,' not deference." *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) (quoting *United States v. Lanier*, 520 U.S. 259, 255 (1997)). Writing for the United States Court of Appeals for the District of Columbia, Judge Starr similarly observed, "Needless to say, in this criminal context, we owe no deference to the Government's interpretation of the statute." *United States v. McGoff*, 831 F.2d 1071, 1080 n.17 (D.C. Cir. 1987). Justice Scalia has similarly noted that "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Crandon v. United States*, 494 U.S. 152, 177 (U.S. 1990) (Scalia, J., concurring in the result). Accordingly, no deference is owed to the Secretary of Defense in assessing whether MCO 1 violates the PMO.

d. The Prosecution's reliance on presidential silence is unpersuasive. The Supreme Court has repeatedly emphasized that "congressional silence 'lacks persuasive significance.'" *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (quoting *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990))). Justice Scalia famously opined that "vindication by congressional inaction is a canard,"[1] a view originally expressed in his dissent in

[1] *Johnson v. Transportation Agency*, 480 U.S. 616, 663 (1987) (Scalia, J., dissenting).

Johnson v. Transportation Agency that was later endorsed by the majority in *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 (1989). Justice Scalia observed that legislative silence is simply too ambiguous – it could mean any number of things, including "unawareness" of the situation that the silence allegedly endorses. *Johnson*, 480 U.S. at 663 (Scalia, J., dissenting).

e. These concerns are equally applicable to the Prosecution's novel attempt at interpretation by presidential silence. The Prosecution argues that President Bush's failure to repudiate MCO No. 1 means that he must have agreed that it was consistent with the PMO, "particularly considering that the changes were made public on 31 August 2005 after coordination with various agencies in the United States Government." D-103, Prosecution Response to Presiding Officer Direction to Respond to Certain Questions at 7 (2 March 2006). There is simply no reason to believe that the President does—and there is also no reason that he should—follow the minutia of the military commission process. On 29 August 2005—two days before the Secretary of Defense issued the revised MCO No. 1, — Hurricane Katrina devastated the Gulf Coast, killing more than 1,200 people and causing tens of billions of dollars in damage. Meanwhile, U.S. troops were conducting combat operations in Iraq and Afghanistan. To believe that in the midst of such crises, the President of the United States took the time to peruse the revised MCO 1 and compare it to his PMO is absurd.

f. Finally, the Prosecution argues that a challenge to the fatal inconsistency between the PMO and MCO No. 1 is not a jurisdictional defense. Prosecution Response at ¶ 7. But Supreme Court precedent reveals that the fatal inconsistency is a jurisdictional defect. As the United States Supreme Court has stated:

> A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to

perform a particular duty. When the object of its creation has been accomplished it is dissolved. 3 Greenl. Ev. § 470; Brooks v. Adams, 11 Pick. 441, 442; Mills v. Martin, supra; Duffield v. Smith, 3 S. & R. 590, 599. Such also is the effect of the decision of this court in Wise v. Withers, 3 Cranch, 331, which, according to the interpretation given it by Chief Justice Marshall in Ex parte Watkins, 3 Pet. 193, 207, ranked a court-martial as "one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally." *To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law.* Dynes v. Hoover, 20 How. 65, 80; Mills v. Martin, 19 Johns. 33. *There are no presumptions in its favor so far as these matters are concerned.* As to them, the rule announced by Chief Justice Marshall in Brown v. Keene, 8 Pet. 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: "The decisions of this court require, that averment of jurisdiction shall be positive -- that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments." All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively.

Runkle v. United States, 122 U.S. 543, 555-56 (1887).

g. This reasoning is even more applicable to trials by military commission, which are even less formal tribunals than courts-martial. If the military commission was not constituted in conformance with the regulations that govern it, it has no jurisdiction to act. And where the regulations that govern it are in fatal conflict, it is impossible for the commission to act in conformance with those regulations. The questions of which members will make legal rulings and which will make factual determinations go to whether the commission is properly constituted to perform each of its functions. Those are jurisdictional issues. Accordingly, the Prosecution bears the burden to establish that the regulations governing the commissions are not in fatal conflict. *See United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002) ("Jurisdiction is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence").

h. The Prosecution's argument for deference to MCO 1 is without merit. The revised MCO 1 violates the PMO and it is this commission's duty to say so.

2. **Attachments**: No further attachments.

By: _____
TOM FLEENER
Major, U.S. Army Reserves
Detailed Defense Counsel

Hodges, Keith H. CTR OMC

From: Hodges, Keith H. CTR OMC [redacted]
Sent: Thursday, March 02, 2006 6:32 PM
To: [redacted]
Cc:
Subject: Decision on Defense Request for Delay

Keith Hodges
Assistant to the Presiding Officers
[redacted]

> -----Original Message-----
> From: Brownback, Peter E. COL OMC
> Sent: Thursday, March 02, 2006 6:27 PM
> To: Hodges, Keith H. CTR OMC
> Subject: Decision on Defense Request for Delay
>
> Mr. Hodges,
>
> Please forward this to counsel in the case of US v. Al Bahlul and to
> all concerned parties.
>
> Please make it part of the PO 103 Filing Series.
>
> COL Brownback
>
>
> All counsel in United States v. Al Bahlul,
>
> 1. The Presiding Officer has considered the defense request for an
> extension on the motions filing deadline contained in RE 169, the defense
> comments, and the prosecution comments, as stated on the record on 2 March
> 2006.
>
> 2. The concerns stated on the record remain valid.
>
> 3. Defense is granted a delay until 1700 hours, 18 April 2006, to
> file law motions as that term is defined in PO 103 D.
>
> 4. The Presiding Officer recognizes that this is not the delay which
> the defense requested. If the defense believes that it is unable to meet
> the filing deadline, the defense will provide the following:
>
> a. The reason why the filing deadline can not be met.
> b. Notice of motions for all motions which it intends to
> file (See paragraph 7, POM 4-3.).
> c. A succinct and exact statement of the date to which it
> wishes the filing requirement extended.
> d. The reasons why such additional delay is needed.
>
> This request for extension, as outlined in 4a-d above, must be filed no
> later than 1700 hours, 14 April 2006.

>
> 5. The filing deadline for the prosecution is extended as done for the
> defense above.
>
> 6. The filing requirements for evidentiary motions will be set during the
> first April 2006 trial term at Guantanamo. The parties will be advised if
> their presence is required at Guantanamo NLT 21 March 2006.
>
> 7. If either party requires a session during the first April 2006 trial
> term, the party will so advise the Presiding Officer as soon as possible.
>
>
> Peter E. Brownback III
> COL, JA, USA
> Presiding Officer
>

Hodges, Keith H. CTR OMC

From: Hodges, Keith H. CTR OMC
Sent: Thursday, March 02, 2006 6:47 PM
To: [redacted]
Cc:
Subject: Decision of the Presiding Officer: Prosecution Request for an Amendment to Discovery Order

Your attention is invited to the decision of the Presiding Officer pasted below.

Counsel in US v. Al Bahlul,

1. As used in this email, "serving counsel" is the counsel attempting to serve discovery materials. "Receiving counsel" is the counsel upon whom discovery materials are to be served.

2. Serving counsel will notify receiving counsel when prepared to serve discovery. This notification will be by email. The proposed service time will be during normal duty hours for the Washington, DC area.

3. Serving counsel will physically take the discovery material to the receiving counsel's office. Serving counsel will attempt to make service on the receiving counsel. If the receiving counsel is not present and has failed to designate a person to receive discovery in his/her absence, serving counsel will leave a document at the receiving counsel's office advising receiving counsel that service was attempted. Serving counsel will email receiving counsel that service was attempted and notice left.

4. The date on which the procedure detailed in paragraph 3 above will be the constructive date of service of discovery. Receiving counsel will arrange to retrieve the actual discovery material from serving counsel at a time and date, during normal duty hours for the Washington, DC area, of his/her choice.

5. If serving counsel makes the notification required by paragraph 3 above and receiving counsel does not or will not provide a time when he or she can receive discovery within 2 duty days of the request, the constructive time of service shall be the date of intended delivery. This matter will be documented by email to receiving counsel. Receiving counsel will arrange to retrieve the actual discovery material from counsel at a time and date, during normal duty hours for the Washington, DC area, of his/her choice.

6. Unavailability of counsel to receive discovery along with refusing to designate a person to receive discovery during a counsel's absence will not be employed to prevent serving counsel from fulfilling their duties under the Discovery Order. In all cases where there is a delay in the actual service of discovery per paragraph 3 or 5 above, that delay will not be considered in determining whether to grant an extension to a filing deadline. If counsel wish to avoid the above-described procedure of constructive delivery dates, they should either be available to receive discovery or arrange for a person to receive it on their behalf.

7. As an advisory matter, the undersigned advises all parties that there shall be no games played with the service of discovery. Counsel will not arrange to serve discovery only after learning about the projected absence of opposing counsel, nor will opposing counsel attempt to hinder the service of discovery. Discovery materials are served to facilitate trial preparation.

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Keith Hodges
Assistant to the Presiding Officers
[redacted]

-----Original Message-----
From: Fleener, Tom A MAJ OMC
Sent: Thursday, March 02, 2006 2:23 PM
To: [redacted]
Subject: RE: Prosecution Request for an Amendment to Discovery Order

Defense objects.

To open the service of discovery on anyone other detailed counsel, unless the counsel specifically designates someone else, takes the ability to manage discovery from the detailed counsel.

It is true, I was TDY when the Govt wanted to serve discovery. I was back for roughly two weeks when the Govt ultimately served me. It is also true that I have an incredible amount of paper in this case with assumably another incredible amount of paper on the way. I want the ability to control the receipt of discovery.

Major Tom Fleener

-----Original Message-----
From: [redacted] Lt Col OMC
Sent: Thursday, March 02, 2006 12:10 PM
To: [redacted]
Subject: Prosecution Request for an Amendment to Discovery Order

ALCON -

Per the Presiding Officer's authorization on the record, and as an exception to the procedures in the POMs, the Prosecution submits the following e-mail request for an amendment to the the Presiding Officer's discovery order of 23 January 2006:

1. Prosecution requests an amendment to the Presiding Officer's discovery order dated 23 January 2006, paragraph 14, wherein it states that service of discovery by the prosecution must be made to the detailed defense counsel "... unless the detailed defense counsel designates another lawful recipient of the items." Prosecution requests that the Presiding Officer amend the order to allow service of discovery items upon the detailed defense counsel (Maj Fleener), the defense paralegal assigned to the case (SSg[redacted]or another person required to be designated by the detailed defense counsel in the absence of both the detailed defense counsel and assigned defense paralegal.

2. The purpose of this request is to facilitate the orderly and timely transfer of required discovery from the prosecution to the defense. It took from the date of the discovery order until 13 February 2006 to serve the defense in the al Bahlul case, primarily because the detailed defense counsel had instructed his paralegal that she could not sign for or accept any discovery on his behalf, and because detailed defense counsel was not available throughout this period to receive discovery personally. Upon inquiry as to whether a designee had been named, the prosecution was told that none had been.

V/R

Lt Col[redacted]Lt Col, USAFR
Prosecutor